INDIAN CLAIMS COMMISSION PROCEEDINGS

(2002) 15 ICCP

Reports

Esketemc First Nation Inquiry
Indian Reserves 15, 17, and 18 Claim

Fishing Lake First Nation
1907 Surrender Claim (Mediation)

Chippewas of the Thames First Nation Inquiry
Clench Defalcation Claim

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to the Carry the Kettle First Nation Cypress Hills Inquiry,
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and to the Flying Dust First Nation, Waterhen Lake First Nation,
Buffalo River Dene Nation, Big Island Lake (Joseph Bighead) Cree Nation
re the Primrose Lake Air Weapons Range (PLAWR) II Inquiries

103-01337/

INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION

(2002) 15 ICCP

CHIEF COMMISSIONER

Phil Fontaine

COMMISSIONERS

Roger J. Augustine
Daniel J. Bellegarde
Renée Dupuis
Alan C. Holman
Sheila G. Purdy

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FROM THE CHIEF COMMISSIONER

On behalf of the Commissioners of the Indian Claims Commission, I am pleased to present this the 15th volume of the *Indian Claims Commission Proceedings*. This volume includes four reports and reproduces responses from the Minister of Indian Affairs to recommendations made by the Commission in six previous inquiries.

The first report, released in December 2001, relates the history, analysis, and findings of the inquiry into the claim of the Esketemc First Nation respecting Indian Reserves 15, 17, and 18. The panel of Commissioners would like to take this opportunity to thank the members of the community for their warm welcome, as well as a most interesting and informative site visit.

In March 2002, the Commission released a report on the results of a successful mediation. The report recounts how the Fishing Lake First Nation actively pursued for seven years their 90-year-old outstanding claim, despite two rejections by Canada. The Fishing Lake First Nation first came to the Commission through its inquiry process, as reported in (1998) 6 ICCP 219. The present report summarizes the events leading to the conclusion of this long outstanding claim and the role the Commission mediation services provided in its successful resolution.

The final two reports in this volume of the *Proceedings* again demonstrate how the Commission's unique process allowed the First Nation and Canada to work together towards the acceptance of these claim for negotiations. The claim of the Chippewas of the Thames First Nation was accepted by government for negotiation in June 2001. Their claim is based on misappropriation of money owed from the sale of lands surrendered to the Crown in 1834. The second claim that was accepted by government for negotiation is the 1911, 1917, and 1919 surrenders claim of the Mistawasis First Nation. During the course of the Commission's inquiry, the First Nation requested that it be placed in abeyance to allow the First Nation and Canada an opportunity to negotiate a portion of the claim. In the spring of 2001, the First Nation informed the Commission that it had ratified a Surrender Settlement Agreement with the Government of Canada.

Also included in this volume are six responses from the Minister of Indian Affairs and Northern Development. With respect to the inquiry into the Cypress Hills claim of Carry the Kettle First Nation, the Minister reviews the Commission's recommendation and the department's response. In his letters on the other five inquiries, the Minister writes that the Government of Canada has rejected the Commission's recommendations in four of the five inquiries: that of the Cowessess First Nation 1907 Surrender Claim Inquiry, and in the case of the Primrose Lake Air Weapons Range (PLAWR) II Inquiries, those of the Flying Dust First Nation, Waterhen Lake First Nation, and Buffalo River Dene Nation. The Minister agrees with the Commission in the fifth inquiry, that of Big Island Lake (Joseph Bighead) Cree Nation, also a PLAWR II inquiry.

Phil Fontaine
Chief Commissioner

ABBREVIATIONS

AC	Appeal Cases
BCARS	British Columbia Archives and Records Service
BCCA	British Columbia Court of Appeal
BCJ	British Columbia Journals
BCSC	British Columbia Supreme Court
BCR	Band Council Resolution
CA	Court of Appeal
CCC	Canadian Criminal Cases
CNLC	Canadian Native Law Cases
CNLR	Canadian Native Law Reporter
CPR	Canadian Pacific Railway
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DSGIA	Deputy Superintendent General of Indian Affairs
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FSIN	Federation of Saskatchewan Indian Nations
FTR	Federal Trial Reports
HBC	Hudson's Bay Company
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
NA	National Archives of Canada
NBQB	New Brunswick Court of Queen's Bench
NBR	New Brunswick Reports

NSCA	Nova Scotia Court of Appeal
NWMP	North-West Mounted Police
OR	Ontario Reports
PC	Privy Council
QB	Court of Queen's Bench
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
SBC	Statutes of British Columbia
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SCW	Specific Claims West
SGIA	Superintendent General of Indian Affairs
SKCA	Saskatchewan Court of Appeal
TD	Trial Division
UTLJ	University of Toronto Law Journal
WWR	Western Weekly Reports
YTCA	Yukon Territory Court of Appeal

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INDIAN CLAIMS COMMISSION

ESKETEMC FIRST NATION INQUIRY
IR 15, 17, AND 18 CLAIM

PANEL

Commissioner Daniel J. Bellegarde
Commissioner Sheila G. Purdy

COUNSEL

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For the Government of Canada
Michael Mladen

To the Indian Claims Commission
Kathleen N. Lickers / Thomas A. Gould

DECEMBER 2001

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PART I

INTRODUCTION

This report sets forth the findings of the Indian Claims Commission regarding certain lands claimed by the Esketemc First Nation[1] to have been set apart as reserves for the Band in 1916 by the Royal Commission on Indian Affairs for the Province of British Columbia (also known as the Royal Commission and the McKenna-McBride Commission). During the course of this inquiry, the lands in question have been referred to for ease of reference as Indian Reserves (IR) 15, 17, and 18, comprising 480 acres, 1,120 acres, and 3,992 acres, respectively,[2] although it has been understood by the parties and the Indian Claims Commission that the designation of these lands as "reserves" has been done without prejudice to Canada's argument that the lands never became reserves, either *de jure* – in conformity with all legal requirements – or *de facto* – without meeting all the legal requirements but nonetheless reserves for all practical purposes. The First Nation further contends that IR 15 and 17 were thereafter wrongfully disallowed, and IR 18 improperly reduced from 3,992 acres to 640 acres by Canada and British Columbia as a result of the work of their respective representatives, W.E. Ditchburn and

---

[1] The Esketemc First Nation was known at the time of all material events in this inquiry as the Alkali Lake Band and, depending on the historical context, will be alternatively referred to in this report as the "First Nation" or the "Band."

[2] During a recess in the oral arguments in Williams Lake on September 26, 2000, representatives of the First Nation provided the Indian Claims Commission with a sketch indicating that IR 18 included lands beyond the 3,992 acres recommended by the McKenna-McBride Commission in 1916. Roughly speaking, these additional lands would appear to have included the fractional north half of section 8, the north half of section 9, and the south half of sections 19 and 20 in Township 76, and the south half of sections 23 and 24 in Township 78 – a total area of just under 900 acres. Since the Indian Claims Commission does not have complete legal descriptions for lands other than those approved by both the McKenna-McBride Commission and by Ditchburn and Clark (the 1,123 acres comprising IR 9A, 11A, 16, and a portion of 18, as finally surveyed by D.M. MacKay in 1927) and those approved by the McKenna-McBride Commission but disallowed by Ditchburn and Clark (the 4,889 acres comprising IR 15 [480 acres], 17 [1,120 acres], and the disallowed portion of 18 [3,992 – 703 = 3,289 acres] as established by MacKay's survey), there is nothing in our record to indicate that these additional lands were even *considered* by the McKenna-McBride Commission. It *is* possible that these additional lands formed the subject matter of other applications for land by the Alkali Lake Band to the McKenna-McBride Commission but *rejected* by that Commission and therefore not surveyed by its surveyor, Ashdown Green. In any event, the First Nation made no submissions regarding these additional lands and for this reason we have refrained from commenting on them.

J.W. Clark, who had been appointed to review the Royal Commission's findings.

Following the initial submission of this claim by the First Nation to Canada in 1992, John Hall, the Department of Indian and Northern Affairs' Research Manager, BC and Yukon, informed former Chief William Chelsea on August 19, 1994, that the department was not prepared to recommend that the claim be accepted for negotiation. In general terms, Hall stated that "the present evidence does not adequately establish that there is an outstanding lawful obligation on the Government of Canada with regard to this claim." More specifically, he outlined Canada's position as follows:

- to the extent that the claim might be based on questions of aboriginal title, it was beyond the mandate of the Specific Claims Directorate;
- the McKenna-McBride Commission was merely authorized to make recommendations and did not have the authority to create reserves, *de facto* reserves, or other legal rights by which Canada would be formally bound;
- the powers of Canada and British Columbia, acting through Ditchburn and Clark, to reject the recommendations of the McKenna-McBride Commission were within the scope of the discretion conferred upon them under the federal government's *British Columbia Indian Lands Settlement Act* and the provincial *Indian Affairs Settlement Act*;
- IR 15, 17, and 18 had never become reserves, and therefore Canada had not become subject to fiduciary obligations arising out of the *Indian Act* and various court cases to uphold those lands as reserve allotments; and
- the facts as alleged by the First Nation did not give rise to a claim based on negligence, contract, or estoppel.

However, Hall also indicated that Canada's position was only a preliminary one and that it was prepared to review further evidence or arguments before taking a final position.[5]

In response to Hall's letter, the First Nation undertook extensive additional research, conducted interviews with elders, and retained counsel to review the legal basis for the rejection. On March 8, 1996, counsel provided Hall with further submissions, including additional documents, survey plans, affidavits, photographs, and new case law, in which he broadened the basis of the claim to include new arguments that IR 15, 17, and 18 were *de facto* reserves and that Canada breached fiduciary obligations to the Alkali Lake Band by failing to refer the reserve issue to the Secretary of State for the Colonies under Article 13 of the *Terms of Union* or to the Exchequer Court under section 37A of the 1906 *Indian Act*, as amended. The First Nation contended that, given the recognition by the McKenna-McBride Commission of the Band's need for additional lands, Canada should have ensured that IR 15, 17, and 18 were allotted or alternatively should have provided other lands or compensation.[4]

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[5] John Hall, Research Manager, BC and Yukon, Specific Claims West, Department of Indian and Northern Affairs, to Chief William Chelsea, Alkali Lake Indian Band, August 19, 1994 (ICC Documents, pp. 536–39, ICC Exhibit 2B).

Two years later, on April 24, 1998, with his initial supplementary submissions under review, counsel for the First Nation wrote to Hall to tender further legal submissions, based on the then recently released decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*.[5] The First Nation asserted that Canada owed a further fiduciary obligation to the First Nation to preserve and protect IR 15, 17, and 18 as "Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*, failing which the First Nation should have been compensated for the lands it had lost.[6]

Despite these additional submissions, Paul Cuillerier, Director General of the Specific Claims Branch, advised Chief Chelsea on October 15, 1998, that Canada still could not recommend acceptance of the claim for negotiation. Canada disputed that IR 15, 17, and 18 were *de facto* reserves on the basis that it had never considered the lands to be reserves and in any event did not have the power to unilaterally create reserves without the concurrence of the province. As for the First Nation's submission that Canada should have allocated alternative lands if IR 15, 17, and 18 could not be provided, Cuillerier further contended that Canada had done all it could to have the lands and other lands designated as reserves but that its hands were tied by the opposition of the provincial government. Finally, Canada considered the First Nation's new arguments based on the *Delgamuukw* case and section 91(24) of the *Constitution Act, 1867*, to be insufficient to support a claim, first, because the First Nation had not established the existence of aboriginal rights or title and, second, because claims based on aboriginal rights or title are outside the scope of consideration under the Specific Claims Policy in any event. However, Cuillerier advised Chief Chelsea that the First Nation had the option of bringing its rejected claim before the Indian Claims Commission for an inquiry.[7]

---

[4] Stan H. Ashcroft, Ganapathi Ashcroft and Company, to John Hall, Research Manager, BC and Yukon, Specific Claims West, Department of Indian and Northern Affairs, March 8, 1996 (ICC Exhibit 5D).

[5] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

[6] Stan H. Ashcroft, Ganapathi Ashcroft and Company, to John Hall, Research Manager, BC and Yukon, Specific Claims West, Department of Indian and Northern Affairs, April 24, 1998 (ICC Documents, pp. 553–55; ICC Exhibit 5E).

On June 17, 1999, counsel for the First Nation wrote to the Indian Claims Commission to request an inquiry into Canada's reasons for rejecting the claim. He enclosed a Band Council Resolution dated June 9, 1999, authorizing the Commission to proceed, as well as copies of the First Nation's original claim submission, Canada's preliminary rejection, the First Nation's two supplementary submissions, and Canada's final rejection. The Commission subsequently conducted planning conferences on September 30, 1999, and February 10, 2000, followed by a staff visit to the First Nation on March 28 and 29, 2000. At a community session on May 2 and 3, 2000, Commissioners Daniel Bellegarde, Carole Corcoran, and Sheila Purdy obtained oral evidence from elders Jimmy Johnson, Willard Dick, Hazel Johnson, Antoinette Harry, Theresa Paul, Laura Harry, Arthur Dick, and Chief Andy Chelsea, and viewed the First Nation's present reserves as well as IR 15, 17, and 18.

In preparation for oral submissions, the First Nation delivered written submissions to the Commission on July 25, 2000. Canada's written arguments were in turn submitted on September 1, 2000, followed by the First Nation's rebuttal submissions on September 18, 2000. The parties presented their oral submissions before the Commissioners on September 26, 2000.

In the days leading up to the oral submissions, counsel for Canada produced six additional documents that he asked to have added as exhibits and in relation to which he sought leave to address in further written submissions. His request was granted, over the First Nation's objection, subject to the First Nation being given an opportunity to respond should it wish to do so following review of Canada's additional written submissions. The six documents became Exhibits 9A through 9F, and Canada's new submissions were delivered to the Commission on October 17, 2000. After some delays arising from the First Nation's need to review Canada's additional submissions and to obtain funding, the First Nation submitted its response on May 10, 2001.

Finally, in the course of the oral submissions on September 26, 2000, counsel for Canada raised the question of whether the First Nation's claim based on negligence was simply precluded because, at common law prior to the implementation of the federal *Crown Liability Act*[8] in 1952, there was no liability in tort against the Crown. Although counsel developed this argument from *Swanson Estate v. Canada*[9] – a case included in the First Nation's book of authorities – counsel for the First Nation was nevertheless taken by surprise and requested an opportunity to address the issue in writing. The Commissioners granted this request, and on October 16, 2000, the First Nation delivered its further written submissions on the duty of care. Canada replied on November 16, 2000.

---

[7] Paul Cuillerier, Director General, Specific Claims Branch, Department of Indian and Northern Affairs, to Chief William Chelsea, Esketemc First Nation, October 15, 1998 (ICC Documents, pp. 556–59; ICC Exhibit 2C).

Following the completion of the oral submissions, the panel lost one of its members with the sudden death of Commissioner Corcoran on February 15, 2001. Accordingly, this report reflects the reasons of Commissioners Bellegarde and Purdy only.

A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[10] This Policy, outlined in the Department of Indian Affairs' 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[11] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.

---

[8] *Crown Liability Act*, SC 1952-53, c. 30.

[9] *Swanson Estate v. Canada* (1991), 80 DLR (4th) 741 (FCA).

[10] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[11] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171–85 (hereafter *Outstanding Business*).

> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[12]

The Commission has been asked to inquire into and report on whether the Esketemc First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

Before turning to the historical background of the claim, we would like to offer two observations regarding our jurisdiction. First, although the Province of British Columbia was obviously a key participant in the facts giving rise to this claim, it is not a party to this inquiry. The explanation is that the Specific Claims Policy, which is the source of the Commission's jurisdiction, is formulated in terms of bilateral relations between Canada and First Nations. Our mandate is limited to identifying whether Canada owes an outstanding lawful obligation to a First Nation and does not extend to determining obligations that may be owed by third parties. Moreover, although there has been debate in some quarters regarding the Commission's ability to add third parties to its proceedings, we have not been called upon to address that question in this inquiry because neither Canada nor the First Nation has asked to have British Columbia added as a third party.

Second, as a commission of inquiry we are not a court of law. We perceive that our mandate under section 2 of the *Inquiries Act* to "cause inquiry to be made" into claims arising under the Specific Claims Policy does not limit us to the witnesses and documents produced by counsel but allows us to conduct our own investigations into questions or matters that may arise during the course of an inquiry. In the present case, for example, the evidence, in our view, did not fully explore factual issues such as colonial reserve creation policy, the role of the Allied Tribes and other Indian organizations in the reserve allocation process in British Columbia, or the subsequent reference of the reserve and aboriginal title issues to a Special Joint Committee of the Senate and House of Commons in 1926 prior to the transfer of the province's proprietary interest in reserve lands to the federal government in 1938.

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[12] *Outstanding Business*, 20, reprinted in (1994), 1 ICCP 179-80.

These matters provide a richer context within which to consider the facts of this case, and, accordingly, we have reviewed and relied to some degree on various secondary sources as well as further primary research to enable us to understand better the complex and lengthy history of reserve creation in British Columbia from 1850 to 1924.

We turn now to the historical background to this inquiry. For ease of reference, we have set out in Appendix B the acreage of the First Nation's reserves as recommended or set apart by Stipendiary Magistrate A.C. Elliott in 1864, by Reserve Commissioner Peter O'Reilly in 1881 and 1895, by the McKenna-McBride Commission in 1916, by W.E. Ditchburn and J.W. Clark (as approved by Canada) in 1924, and finally as surveyed by D.M. MacKay in 1927.

PART II

HISTORICAL BACKGROUND

By necessity, the Indian Claims Commission's review of the claim of the Esketemc First Nation in this inquiry must have careful regard for the actions of the McKenna-McBride Commission, which conducted its hearings and issued its report between 1912 and 1916, and the subsequent review of the McKenna-McBride Commission's report by W.E. Ditchburn and J.W. Clark in the early 1920s. Before the McKenna-McBride Commission, the First Nation had only 14 reserves, and IR 15, 17, and 18 did not yet exist, whether as reserves, as the First Nation contends, or as recommended reserves, which is the limit of what Canada is prepared to admit. On adopting the recommendations of Ditchburn and Clark, the governments of Canada and British Columbia rejected the addition of IR 15 and 17 to the First Nation's list of reserves, and reduced IR 18 from 3,992 acres to just 640 acres.[13] These events, spanning a period of just over 10 years, are at the heart of the First Nation's claim.

Certain aspects of the claim, however, require an appreciation of earlier events underlying the creation of the McKenna-McBride Commission. For example, the First Nation argues that, where Ditchburn and Clark differed on whether reserves proposed by the McKenna-McBride Commission should be reduced or denied, the question should have been referred by Canada to the Secretary of State for the Colonies for resolution in accordance with Article 13 of the Terms of Union by which British Columbia entered Confederation in 1871. Article 13 provides that "a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union," and that "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for the purpose, shall from time to time be conveyed by the Local

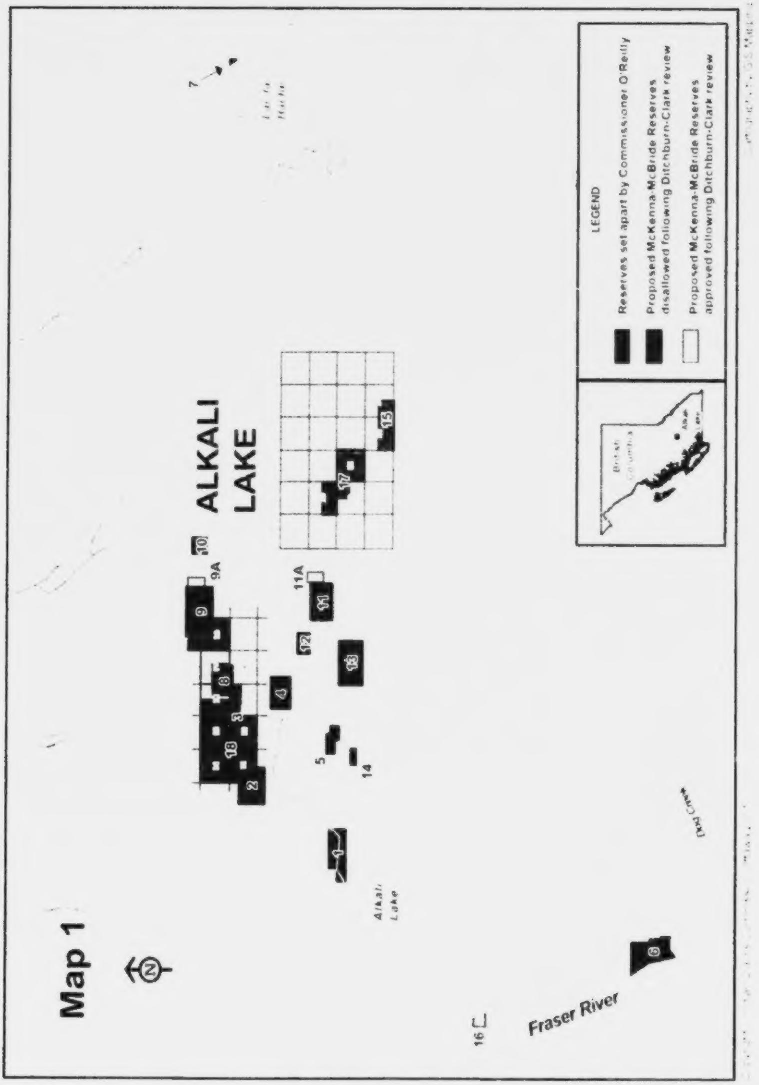
---

[13] It should be noted that, upon the final survey of the new reserves in 1927, the area of IR 18 increased to 703 acres from its original estimated area of 640 acres.

Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government." To understand the significance of these words, it is necessary to recognize the historical context from which Article 13 emerged. Thus, some reference to British Columbia's Indian land policy during its pre-Confederation colonial period is required.

Between 1871 and the advent of the McKenna-McBride Commission in 1912, the Esketemc First Nation received 14 reserves set apart by Reserve Commissioner Peter O'Reilly – seven in 1881, and seven in 1895. In weighing the First Nation's contention that these reserves were insufficient to meet its needs, and that it was inappropriate for Ditchburn and Clark to reject any of the additions proposed by the McKenna-McBride Commission, it is important for the Indian Claims Commission to catalogue the various assessments of the First Nation's land requirements by O'Reilly and others in the earlier intervening years. It is also important to recognize that, while the members of the Alkali Lake Band and other bands waited for reserves to be set apart for their sole use and benefit, significant portions of the lands on which they had already settled and on which they had come to rely were acquired by white settlers. By the McKenna-McBride Commission's terms of reference, those lands – in many instances thought the most desirable by Indians and whites alike – were considered to have forever been forfeited by their aboriginal stewards, notwithstanding whatever prior claims the Indians might have had.

During the pre-1912 period, the intransigence of the British Columbia government was consistently demonstrated by its denial of any Indian interest in provincial lands, its policies aimed at displacing aboriginal residents and entrenching white settlers on "unproductive" Indian territory, and its ongoing insistence on upholding a reversionary interest in reserve lands. This last circumstance made it impractical for an Indian band to seek an exchange of even useless reserve lands for new allocations because the surrendered lands would revert to the province without compensation or other benefit to the band. It is important to understand these facts to be able to identify the sorts of hopes and dreams that Indian bands in British Columbia were willing to pin on the McKenna-McBride Commission, and whether it is reasonable to conclude that Ditchburn and Clark can be viewed as having dashed First Nations' expectations as embodied in the work of that Commission.



Map 1

ALKALI LAKE
LEGEND
▮ Reserves set apart by Commissioner O'Reilly
▮ Proposed McKenna-McBride Reserves disallowed following Ditchburn-Clark review
▯ Proposed McKenna-McBride Reserves approved following Ditchburn-Clark review
British Columbia
Alkali Lake
Fraser River
Dog Creek
1
2
3
4
5
6
7
8
9
9A
10
11
11A
12
13
14
15
16
17
18
N

THE EARLY YEARS

The community of Alkali Lake is situated on Alkali Lake Creek, a tributary of the Fraser River, in central British Columbia roughly 290 kilometres northeast of Vancouver and 235 kilometres southeast of Prince George. The drainage basin of Alkali Lake Creek is dry country, averaging less than 30 centimetres of precipitation per year, with gently rolling terrain and sparse forest cover concentrated along the creeks and rivers.[14] It was this area that, in the late 1700s, was home to the Secwepemc (Shuswap) people – ancestors to the members of the present-day Esketemc First Nation – who roamed widely throughout the area to hunt, trap, trade, and collect food. They also fished extensively in the Fraser River and smaller creeks and lakes to the west and as far east as Lac La Hache; the annual salmon fishery, which formed the mainstay of the community's economy, was adequate on its own to support a reasonably large population.[15] The community's primary village site was situated at the head of Alkali Lake close to the current village on the First Nation's IR 1.[16]

Although European traders had already found their way to the Pacific coast of North America, they had a limited interest in travelling inland when coastal Indians were willing and able to satisfy their desire for furs. A strong British presence in coastal waters was established by the end of the 1790s, largely owing to the explorations of Captain James Cook.[17] Interior aboriginal peoples were not oblivious to the Europeans, however, as stories of their activities and, more significantly, horses, guns, and other trade goods navigated the Indians' traditional avenues of commerce.[18] When North West Company explorer Simon Fraser reached the Fraser plateau region in 1808 on his way to the river's mouth, he reported seeing horses there,[19] and the Indians of Alkali Lake and other areas quickly adapted the animals into their wide-ranging daily activities. Over the next 50 years, a thriving interior fur trade developed, initially with the North West Company and after 1821 with the Hudson's Bay Company.

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[14] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, p. 12 (ICC Exhibit 3C).

[15] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, pp. 7 and 13 (ICC Exhibit 3C).

[16] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, p. 4 (ICC Exhibit 3C).

[17] The first contact between the First Nations of what is now British Columbia and European adventurers came in 1774 when the Spanish navigator Juan Perez met a group of Haida Indians off the Queen Charlotte Islands. Cook's voyages to the same region began in 1778. See Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 1–6.

[18] Wilson Duff, *The Indian History of British Columbia*, Vol. 1, *The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), 55.

[19] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, p. 17 (ICC Exhibit 3C).

In 1846, Britain and the United States entered into the Oregon Treaty to draw a dividing line between British and American territory. But because Britain knew that a mere line on a map would not prevent Americans from pushing northward, it created the new colony of Vancouver Island in 1849 and sought to establish a settlement there to cement its claim.[20] Within two years, James Douglas had become governor and, for much of his tenure, he acted concurrently as head officer of the Hudson's Bay Company in mainland British Columbia (which did not achieve colonial status until 1858). Although this dual role would eventually prove unsatisfactory to settlers on Vancouver Island, in the early years it provided Douglas with a unique opportunity to implement the long-standing British policy, as embodied in the *Royal Proclamation of 1763*, of protecting Indian territory from encroachment by incoming European traders and settlers until the extinguishment of aboriginal title had been negotiated and compensated. As governor of the young, cash-strapped Vancouver Island colony, Douglas was without the funds he required to be able to extinguish title, but as chief factor of the Hudson's Bay Company, he had some money and trade goods at his disposal to dedicate to this purpose. Between 1850 and 1854, he entered into 14 agreements in which Indian bands, in exchange for one-time cash payments, reserve lands, and ongoing hunting and fishing rights, relinquished their "possessory rights" to 358 square miles in the southern portion of Vancouver Island near Victoria; these lands were then made available for settlement. At the same time, the Province of Canada implemented a similar policy, in what would become Ontario, with the Robinson-Superior and Robinson-Huron Treaties of September 1850. After Confederation, the new dominion continued the practice with the numbered treaties in western Canada, commencing in 1871 with Treaties 1 and 2.

THE GOLD RUSH AND THE DEVELOPMENT OF COLONIAL INDIAN LAND POLICY

Before 1858, white settlers in mainland British Columbia were largely involved in the operation of the fur trade. This situation changed dramatically when gold was unearthed along the sandbanks of the Fraser River. During the summer of 1858 alone, an estimated 25,000 to 30,000 gold miners found their way to the Fraser River valley. Initially, the relationship between the Indians and the incoming gold-mining "community" was not altogether different from the economic relationships established during the fur trade. Miners were able to acquire many useful services and goods from their aboriginal neighbours, including guides, canoes, canoemen, porters, and provisions. In return, First Nations people gained access to a variety of trade goods.[21]

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[20] Edgar McInnis, *Canada: A Political and Social History*, 3rd ed. (Toronto: Holt, Rinehart and Winston of Canada, 1969), 316.

Competition soon developed, however; according to Douglas, the Indians were extremely "jealous of the whites and strongly opposed their digging the soil for gold."[22] As the months progressed, competition escalated into unchecked violence and open fighting, since policing and courts were almost non-existent in the Fraser valley. The search for gold expanded rapidly northwards up the Fraser canyon and led to the survey of a land communication route. Completed in 1864, the Cariboo Road became a veritable wagon "super-highway," facilitating the transportation of thousands of people to the gold fields of interior British Columbia. The Cariboo Road and several smaller "miners' trails" that fed into it passed through the traditional lands of the First Nations residing along the Fraser River valley, including those of the Alkali Lake Band.[23]

The most notable consequences of the Fraser River gold rush, however, were not appreciated until gold-mining activities subsided following the initial flurry of 1858. Once the heady days of the gold rush were over, it became widely known that the Fraser River valley contained excellent farming and ranching lands, and people began trickling into the area to pursue these opportunities.[24] On August 2, 1858, British Columbia became a colony, and less than two weeks later Douglas was named governor, subject to the condition that he end his affiliation with the Hudson's Bay Company.[25] Large-scale settlement brought increasing numbers of immigrants, while the Indians, beset by new diseases, alcohol, and other conditions they could not resist, saw their numbers dwindle. To address the growing numbers and demands of settlers, the colonies' formerly *ad hoc* land policy was formalized with the introduction of the pre-emption system in British Columbia's *Land Ordinance* of January 4, 1860, and Vancouver Island's *Land Pre-emption Ordinance* of February 19, 1861.[26] The British Columbia provision, as amended in 1861 and followed by like amendments to the Vancouver Island clause in 1862, stated:

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[21] Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997), 110–11.

[22] See Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 98–100.

[23] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1923," prepared for the Alkali Lake Band, October 15, 1992, p. 19 (ICC Exhibit 5C).

[24] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 102.

[25] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 96.

> 3. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire the right to hold and purchase in fee simple unoccupied, and unsurveyed, and unreserved Crown Lands in British Columbia, *not being* the site of an existent or proposed town, or auriferous land available for mining purposes, or *an Indian Reserve or Settlement*....[27]

Like homesteading provisions in the *Dominion Land Act* of 1872, pre-emption permitted settlers to obtain land for little or no cost by simply residing on the land and complying with certain deadlines for progress in breaking the land, planting crops, erecting houses, and building local infrastructure.

However, although the colonial and later federal schemes shared the common goal of attracting settlement, British Columbia's law differed from the federal legislation in one significant respect: it allowed settlement to precede the completion of surveys. A settler could claim or "pre-empt" up to 160 acres of unsurveyed Crown land in British Columbia (or up to 150 acres on Vancouver Island, with, subject to residency requirements, additional increments of 50 acres for his wife and 10 acres for each child under the age of 18 years), provided the land did not constitute, among other things, "an Indian reserve or settlement." An individual with financial means could purchase any quantity of land adjacent to his original pre-emption, so long as the land was unoccupied and had not been previously claimed.[28] The danger to First Nations was obvious. Because aboriginal title had not been ceded beyond the small area of Vancouver Island covered by the treaties negotiated by Douglas in the period 1850–54, and because few Indian reserves had been surveyed prior to the influx of land-hungry settlers, it became exceedingly difficult to protect traditional aboriginal lands or reserves deemed desirable by incoming settlers. The colonial ordinance merely protected Indian lands physically occupied by a band and made the pre-emptor responsible for ensuring that pre-emption did not encroach upon *bona fide* Indian lands.

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[26] See RSBC 1871, App., 61 and 25, respectively.

[27] *Pre-emption Consolidation Act, 1861*, August 27, 1861, s. 3, as reprinted in RSBC 1871, App., 80. Emphasis added.

With land becoming increasingly scarce and expensive, and his ability to tap Hudson's Bay Company funds for treaty-making purposes ceasing along with his tenure as chief factor, Douglas was forced to seek a loan of £3,000 from Britain to continue his policy of extinguishing native title when the 1,600 acres of public land remaining on Vancouver Island were thrown open for settlement in 1861.[29] Douglas intended to repay the loan out of the proceeds of sale of public lands,[30] and a significant portion of those proceeds would have been returned to Britain in any event.[31] Nevertheless, the Colonial Secretary, despite agreeing that Indian title should be acquired, replied that the funds should be raised locally, since he did not believe the imperial government should be called upon to bear the colony's financial burdens.[32] For its part, the local assembly likewise withdrew its intended appropriation of £2,000 to extinguish aboriginal title at Cowichan once members learned that they would have no control of the sale proceeds.[33] In the meantime, white settlers had been permitted to purchase Indian land in the expectation that the Indian title would be quieted, and, "having paid for their land, [they] were going to claim possession sooner or later, regardless of whether the titles were extinguished or not."[54]

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[28] Proclamation by His Excellency James Douglas, Governor of British Columbia, January 4, 1860, in RSBC 1871, App. 63, s. 7. The original pre-emption proclamation for Vancouver Island did not include a provision allowing the purchase of additional lands, but such a provision was added with the issuance of the *Vancouver Island Land Proclamation, 1862*, on September 6, 1862 (see RSBC 1871, App. 32, s. 6). British Columbia's *Land Ordinance, 1865* of April 11, 1865, limited the amount of additional land that could be purchased in that colony to 480 acres (see RSBC 1871, App. 87, s. 20). After the two colonies were merged in 1866, sections 3 and 25 of the *Land Ordinance, 1870*, RSBC 1871, changed the rules again, permitting pre-emptions of up to 320 acres north and east of the Cascade Mountains and up to 160 acres in the rest of the colony. An individual with a pre-emption of less than 320 acres north and east of the Cascade Mountains was also permitted to pre-empt contiguous land to bring his total holding up to a maximum of 320 acres.

[29] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 79; Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 172.

[30] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 173.

[31] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 79.

[32] Wilson Duff, *The Indian History of British Columbia, Vol. 1: The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), 61.

[33] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 45.

Having failed in his attempt to obtain funds from Britain and the colonial assembly with which to extinguish native title, Douglas then simply focused his efforts on having reserves laid off in the Fraser River region and on Vancouver Island.[55] In doing so, he followed a number of policies aimed at protecting the aboriginal communities in the enjoyment of their lands:

- Douglas issued instructions that the Indians were to be permitted to fix the boundaries of their own reserves,[56] for he believed that "all cause for discontent would be removed if he gave the Indians as much land as they requested" and secured their village sites, cultivated fields, and other "favorite places" against the encroachment of settlers.[57] Since the Indians were not yet farmers, their demands were not large. Although Douglas reported that the reserves did not constitute more than 10 acres per family, the number of acres was not fixed and, and as he later commented in 1874, he never intended to limit the Indians in this respect.[58]
- Unlike some administrators in British Columbia and elsewhere who sought to segregate Indians and settlers, Douglas chose not to do so, "believing that close contact between the races would help to advance the Indians in civilization."[59]
- Although Douglas acknowledged that the Indians held proprietary rights in their traditional territories which should be extinguished by making treaties and paying compensation, he treated the underlying title to reserve land as

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[54] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 49.

[55] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 79; Wilson Duff, *The Indian History of British Columbia*, Vol. 1: *The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), 61.

[56] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 153–54; Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 104–05; Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 175.

[57] Wilson Duff, *The Indian History of British Columbia*, Vol. 1: *The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), 61.

[58] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 105.

[59] Wilson Duff, *The Indian History of British Columbia, Vol. 1: The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), 61.

being absolutely vested in the Crown.[40] For this reason, Douglas considered that reserve land was inalienable, meaning that, although each aboriginal family might have a portion of a reserve allotted for its own use, the land could not be sold by individual Indians or acquired or pre-empted by settlers without the Crown's involvement as an intermediary.[41] Besides preventing such voluntary dispositions of reserve lands by the Indians, Douglas's policy was also intended to protect reserves from less formal encroachments by white settlers.[42]

- Where reserve lands were not being actively used by their aboriginal holders but had agricultural or other potential and were conveniently situated, Douglas pursued a policy of leasing the lands to the highest bidder. He reasoned that rents could be employed to assist the Indians in becoming self-supporting by developing capital infrastructure or by furthering their education and religious instruction.[43]
- In some cases it appeared to make more sense for bands to surrender portions of their reserve lands for sale rather than lease them. Under Douglas, the proceeds from such land sales were to be used exclusively for Indian purposes.[44]
- Douglas took the view that Indians, like white settlers, should be permitted to pre-empt or purchase non-reserve land for their own purposes. "His idea was that a reserve should be regarded in the nature of an ancestral inheritance, as a permanent provision for the aged, helpless, and infirm, but that the great majority of the Indians should take their place in society on an economic equality with white men."[45]

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[40] Wilson Duff, *The Indian History of British Columbia*, Vol. 1: *The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), 61.

[41] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 104; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 41; Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 174.

[42] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 155.

[43] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 174; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, pp. 52–53.

[44] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 104.

[45] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 53.

By permitting Indians to pre-empt and purchase additional land, Douglas intended to provide them with access to as much land adjacent to their reserves as they could reasonably develop for agricultural purposes. Despite the concerns voiced by settlers and sympathetic officials, the right to pre-empt was never widely exercised by Indians, most of whom were still living according to their traditional pursuits; as such, they had little desire to adopt the agricultural practices of the settlers or to comply with the occupancy and other requirements of pre-emption. The other significant reason is that Douglas retired in 1864 and the pre-emption law, by that time in place for only two years, did not long survive his departure.

In many respects, Douglas represented the vanguard of progressive thinking on aboriginal affairs, and his philosophy meshed well with the policies established many years before in the *Royal Proclamation of 1763*. His methods of implementing those policies, however, later proved to be their undoing. When he retired, he had not yet established a codified system for the establishment of reserves for the use and benefit of the Indians, and their rights to acquire and pre-empt land were likewise undefined.[66] Moreover, to save the expense of having reserves surveyed and recorded, he had instructed his officials simply to mark the reserves using wooden stakes until the colonies could afford to retain and pay surveyors; these temporary measures "proved a source of much trouble in later surveys, as in many instances they could not be found, many of them having been removed."[67] Similarly, little had been done to document the reserves already set apart, and there is no record of the Indians ever receiving Crown grants for lands they had pre-empted.[68] As long as Douglas remained governor, the Indians had little cause for concern, since their lands were secure, but, "[b]ecause his land policy had not been established by statute, it was subject to misinterpretation and manipulation when men less favourably disposed towards the Indians came to power."[69]

Ironically, the manoeuvres aimed at undermining Douglas's policy originated in large part from the office of the Commissioner of Lands and Works, Joseph William Trutch, who had been chosen for the position by

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[66] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 175–76.

[67] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 50.

[68] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 178.

[69] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 156–57.

Douglas himself. Trutch endorsed the philosophy that true ownership of land could be acquired "only by the addition of labour in horticulture and husbandry."[50] He employed this philosophy to justify his policy of moving Indians aside to make way for white settlers who would use the land more "productively" and "efficiently." He believed that reserves of 50 to 200 acres for each adult man along the Fraser River, as set apart by surveyor William McColl in 1864 at the instruction of Douglas, should be "materially reduced" because "they were not all being used by the Indians and because they contained rich pastures or readily cultivable portions, 'greatly desired for immediate settlement,' and, at the moment, were 'utterly unprofitable to the public interest.'"[51] To achieve this goal, he proposed two possible solutions: either negotiate with the Indians to buy the lands back – an idea that Trutch considered offensive because he did not consider the Indians to have any rights to the lands they claimed – or simply disavow McColl's authority on the basis that he had "misinterpreted Douglas' wishes and had created reserves of land far beyond the wants or expectations of the Indians."[52] Governor Frederick Seymour concurred with the latter course and, in 1867, Indian lands in the Fraser valley – "reserves that Douglas considered quite satisfactory in their original form"[53] – were reduced, just as the reserves of the Kamloops and Shuswap Indians had been cut back the preceding year.[54] In the course of doing so, Trutch distorted Douglas's earlier instruction that, if the area demanded by the Indians did not equal 10 acres per family, then the reserves should be enlarged to that extent; whereas Douglas intended no fixed number of acres and simply used 10 acres as a *minimum* allotment, Trutch rationalized his reserve reduction program by instead using 10 acres as the *maximum* acreage to be permitted.[55]

Hand in hand with reserve reductions and limits on acreage allotments came amendments to British Columbia's pre-emption legislation. The new section in 1866 stated:

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[50] J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989), 147-48.

[51] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 180.

[52] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 180-81; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 84.

[53] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 164.

[54] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 108-09.

[55] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 165.

> 1. The right conferred ... on British subjects, or aliens who shall take the oath of allegiance, of pre-empting and holding in fee simple unoccupied, and unsurveyed, and unreserved crown lands in British Columbia, shall not (without the special permission thereto of the Governor first had in writing) extend to or be deemed to have been conferred on ... any of the Aborigines of this Colony or the Territories neighbouring thereto.[56]

In 1870 this prohibition was extended to "any of the Aborigines of this Continent."[57] Although Douglas had intended that pre-emption by Indians would permit them to integrate more easily into colonial society, these new enactments effectively stifled any further opportunities for aboriginal pre-emptions. The combination of reducing reserve allotments, withdrawing the Indians' right to pre-empt, and failing in any practical way to protect reserves from pre-emption by settlers severely eroded the position of the Indian in colonial British Columbia.

It was in this general context that the first disputes over land in the Alkali Lake region arose. H.O. Bowie and Philip Grinder had already registered a pre-emption claim on March 19, 1861, "for land at the head of Alkali Lake 'running north-west from the creek.'"[58] Although members of the Alkali Lake Band had long resided in the area, their initial reserve – a 40-acre parcel "situated at the Band's principal village site near Alkali Lake, adjacent to H.O. Bowie's ranch" – was not set apart until September 1864 by Stipendiary Magistrate A.C. Elliott. By this time, Douglas had already retired, as is evident in the instructions Elliott received from the Colonial Secretary:

> I fully agree with you that the Indians should be protected in the occupation of their lands and I have to instruct you to take steps with all convenient speed, for marking out the Indian Reserves in your District.
>
> This can only be done by a personal inspection and conference with the Indians on the ground when they will point out the spots they require or are accustomed to use. *The Reserves thus made should in no case exceed an area equal in the aggregate to 10 acres to each family of the tribe residing on the particular spot. In cases where from the propinquity of white settlers it is not possible to find so large a proportion a less must suffice.*[59]

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[56] *Pre-emption Ordinance, 1866*, March 31, 1866, s. 1, as reprinted in RSBC 1871, App., 93-94.

[57] *Land Ordinance, 1870*, June 1, 1870, s. 3, in RSBC 1871, 93.

[58] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1923," prepared for the Alkali Lake Band, October 15, 1992, p. 25 (ICC Exhibit 3C).

[59] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1923," prepared for the Alkali Lake Band, October 15, 1992, p. 28 (ICC Exhibit 3C). Emphasis added.

Bowie later bought out Grinder's interest and, in 1867, took further advantage of the pre-emption legislation by acquiring a further 320 acres adjacent to his pre-emption claim.[60] The members of the Alkali Lake Band, by comparison, "found themselves at least technically confined to a land base of only forty acres."[61]

CONFEDERATION AND THE *TERMS OF UNION*

Seymour died in 1869 and, within a few months, Britain appointed Anthony Musgrave as his successor. By this time, negotiations were already under way to admit British Columbia into Confederation, and Musgrave's role as the last colonial governor was to expedite the process as much as possible. With his attention directed elsewhere, the governor was criticized for his lack of Indian policy, but Trutch rallied to his defence. "The Indian policy of the British Columbia Government," Trutch wrote, "did not consist in a written code based on legislation, but was nevertheless a definite, tangible, well considered system, ably devised by experienced men, especially interested in the favour of the Indians." Proof of the success of this policy could be found in the absence of "Indian disturbances" in British Columbia.[62] Trutch contended that the Indian interest in land was purely usufructuary rather than beneficial;[63] accordingly, "the title of the Indians in fee of the public lands, or any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied."[64]

By the time British Columbia joined Canada in 1871, Confederation had been in place for four years. Under section 146 of the *British North America Act* (now the *Constitution Act, 1867*), the admission of Britain's other North American territories into the union was already contemplated:

> 146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of

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[60] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1923," prepared for the Alkali Lake Band, October 15, 1992, pp. 25–26 (ICC Exhibit 5C).

[61] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1923," prepared for the Alkali Lake Band, October 15, 1992, p. 31 (ICC Exhibit 5C).

[62] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 94.

[63] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 100.

[64] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 174.

> Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

In accordance with those terms, Canada's original provinces – New Brunswick, Nova Scotia, Ontario, and Quebec – had been joined in 1870 by Manitoba, and Prince Edward Island would follow in 1873.

For British Columbia's aboriginal population, Confederation represented "perhaps the last chance ... of policy towards them undergoing any significant change."[65] But, as historian Robin Fisher explains, the opportunity was lost:

> Knowing that Canada's Indian policy was somewhat different from British Columbia's, the Indians hoped that a new system would be adopted towards them after Confederation. They thought that the changes in the white man's world might bring them a better deal, particularly over land. Throughout the 1870's the Canadian authorities were making treaties with the prairie Indians to extinguish their title to the land. These treaties were indicative of a policy that was different from British Columbia's in a number of ways. The prairie Indians had none of the freedom of choice implied by the word "treaty," for the numbered treaties were imposed on the Indians rather than negotiated with them. Nevertheless, these treaties were a recognition of the principle that the Indians had rights to the land that ought to be extinguished before settlers moved in. The minimum of 160 acres per family was a much larger allocation of reserve land than British Columbia had given, and in addition there was provision in the treaties for initial payments followed by annuities and other forms of assistance. The formality of a treaty involved a limited recognition of Indian rights and needs such as had not occurred in British Columbia since 1859, and after Confederation the Indians hoped that this policy might be extended across the Rockies.
>
> But they were to be disappointed. The Indians were totally unrepresented in the negotiations that preceded Confederation, and their concerns were given virtually no consideration in the business deal that established the union with Canada.... Consequently, the Terms of Union proposed by the governor-in-council of British Columbia contains no reference to the Indians.[66]

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[65] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 175.

[66] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 175–76.

By the time the *Terms of Union* were submitted to Britain and approved on May 16, 1871, however, Article 13 was in place as the operative provision for dealing with Indian affairs in the new province following union. Article 13 states:

> **13.** The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and *a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.*
>
> To carry out such policy, *tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate* for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[67]

It appears to be common ground among commentators that Article 13 was added during the negotiations in Ottawa, and that Trutch, as "the only person closely involved with colonial Indian policy who was present at those discussions," was the likely author.[68]

Article 13 has been variously described as "deliberately misleading,"[69] "curious,"[70] "deliberately ... ambiguous,"[71] a "travesty" and a "disappointment,"[72] and "shockingly cynical,"[73] since British Columbia's Indian land policy, compared to practices in other parts of Canada, was not liberal at all. As the Indian Claims Commission noted in its report on the McKenna-McBride applications claim of the 'Namgis First Nation, "[g]iven the ambiguous wording contained in Article 13, it is hardly surprising that the Indian land question would prove to be one of the more contentious issues between the two levels of government."[74] In its subsequent report on a similar claim by the Mamalelegala Qwe'Qwa'Sot'Enox Band, the Commission similarly concluded that the "equivocal wording" of the clause "actually impeded the evolution of Indian land policy in the province because it did not provide a clear formula for the allocation of reserves and it was too open to interpretation."[75]

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[67] British Columbia, *British North America Act, 1867: Terms of Union with Canada, Rules and Orders of the Legislative Assembly* (Victoria: R. Wolfenden, 1881), 66 (ICC Documents, p. 5). Emphasis added.

[68] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 175–76; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 136.

[69] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 177.

[70] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 177; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 136.

[71] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 186.

[72] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 92.

[73] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 80.

The clause appears to have resulted in large part from the efforts of Trutch and other colonial administrators to conceal from Canada the miserly and *ad hoc* nature of colonial Indian land policy in the late 1860s so that the new province could avoid being committed to the more generous approach used elsewhere in Canada. Some of the fault lay with Canada's negotiators, however, who seem to have taken for granted that British Columbia's policy was much the same as that followed by Canada and Britain elsewhere in North America for over a century:

> Canadian officials were quite uninformed about the province's Indian policy. They assumed that it had, like their own, been in accord with the Royal Proclamation of 1763. Subsequently, one federal minister in charge of Indian Affairs, David Mills, confirmed that Canada had believed that the Indians had surrendered their territories by treaty; and another, David Laird, indicated that Canada had assumed that British Columbia reserves, like those in northern Ontario, contained at least eighty acres a family.
>
> Trutch, who had travelled to Ottawa for the negotiations, obviously did not give full information, and he left the impression that British Columbia had indeed been liberal and generous in awarding reserves and other benefits. It was in this context that the Canadians accepted the promise of continued liberality and did not realize that Trutch's phrase "of such extent as it has hitherto been practice ... to appropriate" meant that the province would never in the future have to award more than ten acres a family for reserve purposes. The province's power to veto reserves exceeding ten acres a family would rest on the provincial Crown's now being recognized, in both the terms of union and under the British North America Act, as having direct title to public lands. The Canadian government would have no power to compel the provincial government to appropriate more than ten acres a family.[76]

Accordingly, Canada accepted obligations under Article 13 reflecting the practices it had already established under section 91(24) of the *Constitu-*

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[74] ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), reported (1998), 7 ICCP 109 at 129.

[75] ICC, *Inquiry into the McKenna-McBride Applications of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 210.

[76] Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), 44.

tion Act, 1867[77] – extinguishing Indian title and establishing reserves – whereas British Columbia's limited commitment constrained Canada's ability to fulfill those obligations.

The 10 years following Confederation revealed British Columbia's attitude to be one of constant intransigence with respect to providing the necessary land and to Indian rights to land. The appropriate size of reserves was soon at issue. The Indians were already upset, not only because their settled areas, cultivated lands, and burial grounds were being pre-empted, but because they were beginning to understand the concept of ownership of land and the value of land; they wanted land for agriculture and were starting to feel "hemmed in" by white settlers.[78] Canada appointed Dr Israel Wood Powell as Superintendent of Indian Affairs in British Columbia in November 1872, but his scant instructions from Ottawa left him powerless to act, as they did not specify how many acres to set aside for each band. Early in 1873 Deputy Superintendent of Indian Affairs William Spragge, suggesting that it would not be necessary to set apart reserves as large as 160 acres for each family as had been done in Manitoba, recommended setting aside 80 acres of good average quality farm land per family "wherever the Indians have or may desire to establish themselves and engage in the cultivation of land."[79]

Powell, intending to get started with the surveys as soon as possible, placed these instructions before provincial authorities, but the Chief Commissioner of Lands and Works, Robert Beaven, objected, claiming that 80 acres was "far too large an average for each family" and pointing out that the existing average was only six acres. The province's Executive Council, in a Minute dated July 25, 1873, urged reserves of 20 acres per family of five, since 80 acres was "greatly in excess of the grants considered sufficient by previous governments of British Columbia."[80] On Powell's advice, Minister of the Interior David Laird on March 1, 1874, counselled the federal cabinet to accept the 20-acre figure, although he roundly criticized the province's reluctance to be more cooperative on this issue.[81] However, when the province was asked for the appropriate amount of land to increase the holdings of the Musqueam Band to the required area, it responded that the agreed 20 acres per family was intended to apply only to *future* reserves and was not meant to extend *existing* reserves. Moreover, to offset Canada's proposal to increase the size of reserves, the province also demanded that, where band populations had declined, dominion authorities should be required to *reduce* the size of existing reserves accordingly. These limitations meant that the 20-acre figure would apply to few reserves in the province, and declining Indian populations suggested that the province actually stood to *gain* land.[82]

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[77] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 186.

[78] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 196–97.

[79] William Spragge, Deputy Superintendent General of Indian Affairs, to Superintendent General of Indian Affairs, January 2, 1873, National Archives of Canada (hereafter NA), RG 10, vol. 3583, file 1102 (ICC Documents, pp. 9–12).

[80] British Columbia, *Sessional Papers*, 1st Parl., 4th Session, 1875, 666, in Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 198.

[81] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 196.

As a result of this impasse, the federal officials stopped all surveys. This action provoked considerable unrest among the province's aboriginal population. It also prompted a strongly worded condemnation of provincial Indian policy by the Reverend C.J. Grandidier of the Okanagan Mission which was published in the Victoria *Standard* of August 28, 1874:

> The whites came, took land, fenced it in, and little by little hemmed the Indians in their small reservations.... Many of these reservations have been surveyed without their consent, and sometimes without having received any notice of it, so they could not expose their needs and their wishes. Their reserves have been repeatedly cut off smaller for the benefit of the whites, and the best and most useful part of them taken away till some tribes are coralled [sic] on a small piece of land, as at Canoe Creek or elsewhere, or even have not an inch of ground, as at Williams Lake. The natives have protested against these spoliations, from the beginning. They have complained bitterly of that treatment, but they have not obtained any redress....[83]

In direct response to this letter and others, Laird made an impassioned plea to his cabinet colleagues on November 2, 1874. In it he reviewed the "present state of the Indian land question," pointing out the great importance for all to have it settled, and echoing Powell's observation that, "[i]f there has not been an Indian war, it is not because there has been no injustice to the Indians but because the Indians have not been sufficiently united." He continued:

> To the Indian, the Land question far transcends in importance all others, and its satisfactory adjustment, in British Columbia will be the first step towards allaying the

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[82] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 107.

[83] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 185; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 109.

> wide-spread and growing discontent now existing among the Native tribes of that Province.
>
> The adjustment of this important matter is not a little complicated from the fact that its solution requires the joint action of the Dominion Government and the Government of British Columbia, and involves a possible reference to the Secretary of State for the Colonies.

He drew specific attention to Article 13 of the *Terms of Union*:

> When the framers of the terms of admission of British Columbia into the Union inserted this provision [Article 13] requiring the Dominion Government to pursue a policy as liberal towards the Indians as that hitherto pursued by the British Columbia Government they could hardly have been aware of the marked contrast, between the Indian policies which had, up to that time, prevailed in Canada and British Columbia respectively ... All concur in the opinion that, until the land grievances of which the Indians complain are satisfactorily redressed, no treatment however liberal or humane in the way of money grants or presents will avail to secure peace or contentment among them ...
>
> The Indians of British Columbia, especially those in the Interior of the Province, are intelligent and industrious and likely to turn to good account any farming lands which may be assigned to them. Moreover they already own large herds of horses and cattle, and a liberal allowance of pastoral land is to them a matter of absolute necessity to enable them to support their stock ...
>
> In laying the foundation of an Indian policy in that Province on the same permanent and satisfactory basis as in the other portions of the Dominion, the Government of the Dominion feel they would not be justified in limiting their efforts to what under the strict letter of the Terms of Union they were called upon to do. They feel that a great national question like this, a question involving possibly in the near future an Indian war with all its horrors, should be approached in a very different spirit, and dealt with upon other and higher grounds ...
>
> The policy foreshadowed in the provisions of the 13th Clause of the British Columbia [T]erms of Union is plainly altogether inadequate to satisfy the fair and reasonable demands of the Indians.
>
> To satisfy these demands, and to secure the goodwill of the natives, the Dominion and local Governments must look beyond the terms of that agreement, and be governed in their conduct towards the aborigines by the justice of their claims and by the necessities of the case.

He ended with these words:

> The undersigned would therefore respectfully recommend that the Government of the Dominion should make an earnest appeal to the Government of British Columbia, if they value the peace and prosperity of their Province, if they desire that Canada as a whole should retain the high character she has earned for herself by her just and

> honorable treatment of the red men of the forest, to reconsider in a spirit of wisdom and patriotism, the Land grievances of which the Indians of that Province complain apparently with good reason, and take such measures as may be necessary, promptly and effectually to redress them.[84]

Two days later, on November 4, 1874, Laird's recommendations were adopted by Order in Council.[85]

Although stung by Laird's allegations, the British Columbia government was not persuaded. It introduced new legislation – the *Land Act* of 1874 – which, in keeping with the province's apparent disinterest in settling the Indian land issue, treated Crown lands as the absolute property of the province and failed to deal with Indian reserves or lands to be set apart for such purposes. Canada's Minister of Justice, Télesphore Fournier, disallowed the legislation, stating:

> The undersigned would also refer to the British North America Act, 1867, section 109, applicable to British Columbia, which enacts in effect that all lands belonging to the Province, shall belong to the Province, "subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same."
>
> That which has been ordinarily spoken of as the "Indian title" must of necessity consist of some species of interest in the lands of British Columbia.
>
> If it is conceded that they have not a freehold in the soil, but that they have an usufruct, a right of occupation or possession of the same for their own use, then it would seem that these lands of British Columbia are subject, if not to a "trust existing in respect thereof," at least "to an interest other than that of the Province alone."[86]

British Columbia later introduced similar legislation that addressed, to some extent, Fournier's concerns, and, although he still held reservations about the new provisions, he elected not to disallow them.

In 1875, British Columbia Premier George Walkem admitted "the absolute necessity and urgent importance" of quickly settling the reserve question, but he attributed blame for the failure to reach an agreement on Canada's lack of awareness of "the physical structure of this country, and of the habits of the Indians." He argued that the province's physical features, lack of agricultural land, and widely disparate bands – some 30,000 being fisherman and hunters, others being labourers, and still others being stock-breeders and small-scale farmers – militated against a uniformity of acreage from band to band. In Walkem's view, the first two types of bands would not benefit from large tracts of agricultural land and indeed might suffer from having to convert to agrarian pursuits, but he conceded that the stock-breeders and farmers would require "a liberal allowance of farming lands" and "as much pastoral land for their [horses and cattle] as [for] equal numbers of stock owned by the white settlers."[87] Still, he considered the enlargement of existing reserves to be impractical since they were, in many instances, surrounded by white settlements. Setting apart additional lands at any distance from the existing reserves would entail the difficult task of selecting band members who would be removed from lands they considered the common property of the community to which they belonged, and compelling each such individual "to part from his tribe, his friends, and the home to which he had long been attached by the strongest natural ties."

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[84] David Laird, Minister of the Interior, to Governor General in Council, November 2, 1874, in *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), Case in Appeal, Ex. 4, 26–30 (SCC). A handwritten version of this letter is in the record at ICC Documents, pp. 14–28.

[85] Order in Council, November 4, 1874 (ICC Documents, pp. 29–30).

[86] Télesphore Fournier, Minister of Justice, to Governor General in Council, January 19, 1875, NA, RG 10, vol. 11047, 33/General, Part 6, in *Appendix to the Journals of the Senate of Canada, 1926–27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), 43. Although Fournier did not disallow the subsequent modified legislation, his reasons for rejecting the initial legislation became the first of four touchstones of virtually all Indian submissions to the federal and provincial governments "to demonstrate to the province the legal basis of their claims to a beneficial interest to all land of the province." Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 199.

Ultimately, to resolve the matter, Walkem proposed that, in setting apart reserve lands, "no basis of acreage for Indian Reserves be fixed for the Province as a whole, but that each nation (and not tribe) of Indians of the same language be dealt with separately." He suggested that the reserves "contain, in addition to agricultural land, a large proportion of wild and forest land," likely because the province could, without "impoverishing" itself, provide "very extensive" reserves that would be "so satisfactory to the Indians as to allay all irritation and jealousy towards the whites." At the same time, he recommended that, in advance of new reserves being set apart for the Indians, their existing reserves be surrendered to British Columbia. The combined effect of these proposals was to surrender "all the best agricultural holdings of the Indians in favor of large allotments of mostly wild land" – clearly advantageous, from the provincial perspective, "for at most the improvements for which the Government would have been called upon to reimburse the Indians would have been slight, while at the same time any valuable areas near large centers of population would have become available for the white population."[88] Finally, Walkem proposed

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[87] George A. Walkem, Premier and Attorney General, to Lieutenant Governor in Council, August 17, 1875, in *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), Case in Appeal, Ex. 4, 51 [illegible]

> [t]hat each Reserve shall be held in trust for the use and benefit of the Nation of Indians to which it has been allotted; and in the event of any material increase or decrease of the members of a Nation occupying a Reserve, such Reserve shall be enlarged or diminished as the case may be, so that it shall bear a fair proportion to the members of the Nation occupying it. The extra land required for any Reserves shall be allotted from vacant Crown lands, and *any land taken off a Reserve shall revert to the Province* ...

The essence of the proposal was that, unlike reserves relinquished by bands elsewhere in Canada, reserve lands surrendered by a British Columbia band could not be sold or leased for the benefit of the *band* but instead would become the property of the *province*. Until this point, the major concerns of the Indians with regard to lands had been acreage, location, and aboriginal title, but now the reversionary interest in reserves emerged as a fourth bone of contention, since "[t]here was no final surety for the Indian with respect to title of his lands."[89]

Although it might appear that Walkem's position "could only lead to a complete deadlock with the Dominion,"[90] Canada's Acting Minister of the Interior, R.W. Scott, on November 5, 1875, signalled the federal government's willingness to accept virtually every major principle set forth in it. Canada gave up "any idea of extinguishing Indian title ... because of the expense that would be involved" and because the federal government was reluctant to raise the issue as long as the Indians were seemingly "contented."[91] Title was not the only concession:

> In reality the Province gained everything it contended for and more. In the first place the demand for definite acreage was surrendered by the Dominion Government.... Furthermore, in the final decision as to reserves, the Province was to have an equal voice by being represented equally on the Commission, whereas previously the

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[88] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, pp. 120–21.

[89] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 126; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 103.

[90] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 108.

[91] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 188.

> Dominion Commissioners in the Province had been guided solely by Dominion policy. Finally the Province was to secure reversionary interest in all lands cut off from reserves because of decreasing population, the only condition being that the Province pay for improvements.... A sort of dual ownership was set up, which made it practically impossible for the Dominion to dispose of reserve land or its timber or other valuables for the benefit of the Indians.... It is indeed anomalous that the very moment when the Canadian Government was in a strong position, when the Imperial Government was roused to action and determined to give every support to the Dominion Government, that the latter should have surrendered almost every point for which it had long contended.[92]

The only objection raised by Scott lay in the fact that Walkem's five-point proposal failed to provide for the *prompt* and *final* adjustment of the reserve question. Accordingly, Scott recommended that the matter be referred to three Commissioners, two to be appointed by Canada and British Columbia respectively and the third by the two governments jointly. The Commissioners were to meet and arrange as quickly as possible following their appointments to visit each Indian nation and, "after full inquiry on the spot into all matters affecting the question, to fix and determine for each nation, separately, the number, extent, and locality of the Reserve or Reserves to be allowed to it."[93]

Thus, the two governments moved into a new period of reserve selection. But before the new Commissioners had even started their work, the Indians of Alkali Lake and other bands in the British Columbia interior had lost "significant portions" of their best lands to pre-emption by settlers setting up large areas of land for ranching.[94]

THE JOINT RESERVE COMMISSION

Canada sought to proceed immediately with the work of the Commission since an early start would do much to placate the Indians. By early May 1876, Canada had selected Alexander C. Anderson of North Saanich, British Columbia, a former chief trader with the Hudson's Bay Company, as its appointee to the Commission.[95] It was not until August, however, that the province chose Archibald McKinley of Lac la Hache – another former Hudson's Bay Company man – as its appointee and tendered Gilbert Malcolm Sproat as the joint member of the panel. Canada quickly agreed to Sproat's selection, but by then the Commissioners had lost the summer for field work.[96] The next months were spent in organizational and jurisdictional issues and it was not until late 1876 and early 1877 that the Commissioners began visiting reserves.

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[92] George Edgar Shankel, "The Development of Indian Policy in British Columbia" (unpublished doctoral thesis, University of Washington, August 1, 1945), pp. 123-24.

[93] R.W. Scott, Acting Minister of the Interior, to Governor General in Council, November 5, 1875, in Gosnell's *Minister of Lands* (Victoria: The Colonist Presses, 1912), Case in Appeal, Ex. 4-48-48 (SCC) (ICC Documents, pp. 51-54).

[94] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861-1925," prepared for the Alkali Lake Band, October 15, 1992, p. 27 (ICC Exhibit 3C).

[95] George Edgar Shankel, "The Development of Indian Policy in British Columbia" (unpublished doctoral thesis, University of Washington, August 1, 1945), p. 125.

Perhaps the most difficult question to be considered was whether the Commissioners could, without the consent of a band, reduce the size of the band's reserve to reflect a decrease in the number of Indians occupying it. Although the agreement between Canada and British Columbia authorized the Commissioners to reduce a reserve if it ceased to be proportional to the band's population, Canada insisted that band consent would still be required. British Columbia called for an amendment to the surrender provisions of the *Indian Act*, failing which it "anticipated the entire miscarriage of the Commission."[97] Ultimately, the federal government relented, issuing a proclamation on December 23, 1876, that exempted "Indian Lands and Indian Reserves" in the province from the operation of the Act's surrender provisions, thereby enabling the Commissioners "to deal absolutely and at once with the British Columbia Reserves."[98]

In the midst of the Commission's preparations, the Governor General, Lord Dufferin, visited Victoria and roundly criticized the province's Indian land policy and in particular its failure to acknowledge aboriginal title:

> I think there has been an initial error, ever since Sir James Douglas quitted office, in the Government of British Columbia neglecting to recognize what is known as the Indian title. In Canada this has always been done; no Government, whether provincial or central, has failed to acknowledge that the original title to the lands existed in the Indian tribes and communities that hunted or wandered over them. Before we touch an acre we make a treaty with the chiefs representing the bands we are dealing with, and having agreed upon and paid our stipulated price – oftentimes arrived at after a great deal of haggling and difficulty – we enter into possession, but not until then do we consider that we are entitled to deal with an acre. The result has been that in

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[96] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992), 189.

[97] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, pp. 128–29.

[98] Canada, *Proclamation*, December 23, 1876, "Report of the Department of the Interior for Year Ended June 30, 1876," January 6, 1876, in *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), "Case in Appeal," Ex. 5, 51–54 (SCC).

> Canada our Indians are contented, well affected to the white man and amenable to the laws and government."[99]

The three Commissioners commenced their visits to the various bands in late 1876 and early 1877. It was not long before A.C. Elliott, British Columbia's Provincial Secretary, registered objections to the process, labelling it "elaborate and cumbersome" and expressing concerns at the likely time and expense to be incurred if the Joint Reserve Commission continued at its existing rate.[100] In the end, the parties agreed to reducing the Commission to a single member – Sproat. The province agreed not to interfere with Sproat's work "except in extreme cases," provided Canada paid all his expenses and half the cost of a referee. Canada accepted this arrangement on April 24, 1878.[101]

Developments in the Williams Lake Agency

Just as Sproat's tenure as sole Commissioner was confirmed, dissatisfaction flared in the Williams Lake Agency. In a letter dated April 15, 1878, to James Lenihan, appointed as a second Superintendent of Indian Affairs in 1874, the Reverend J.M. McGuckin of the St Joseph's Mission at Williams Lake wrote:

> The Indians in this section are becoming very discontented and using threatening language on account of the delay in settling their reserves.
>
> I have used all my endeavours to keep them quiet up to the present, but it is evident that they will not heed me much longer in this matter. If something is not done for them immediately it is thought that they will even take possession of the land of some of the settlers together with the crops thereon this season. An attempt of this kind would be disastrous to all concerned, but on account of the small number of settlers, these would be the first and greatest sufferers.[102]

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[99] Excerpts from the speech of Lord Dufferin, Governor General, in September 1876, are set forth in P.D. McTavish, Chairman, to Governor General of Canada in Council, "Memorial of the Conference of Friends of the Indians of British Columbia," November 4, 1912, and George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 130. Lord Dufferin's speech later formed the second touchstone of Indian submissions to the federal and provincial governments on aboriginal title.

[100] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 135.

[101] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3 at 19-20; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 136.

[102] J.M. McGuckin, OMS, St Joseph's Mission, to James Lenihan, Superintendent of Indian Affairs, April 15, 1878, NA, RG 10, vol. 3665, file 9803 (ICC Documents, p. 56).

A memorandum prepared for Indian Affairs listed additional reasons for aboriginal discontent:

> Reservations of Land should be secured for the Indians in all districts of sufficient size to meet their wants, and as much good land given them as possible. At present large portions of their Reserves are useless, consisting of rocky and heavily lumbered ground which it is impossible for the Indian to clear and grub.
>
> In the Interior the letting of pastoral leases has greatly retarded the increase of Native Cattle, the Tribes having now but little grazing land, at the same time causing dissatisfaction, as the Leased Lands are not fenced. The Indian Cattle consequently stray, and the owner is brought before a Justice of the Peace and heavily fined....
>
> Surveys of the Reserves should be made without loss of time, and the lands allotted, each family's patch should be clearly defined....[103]

On May 6, 1878, Sproat advised McGuckin that he would not be able to visit Williams Lake that year. He was previously committed to finishing the work already begun in the southern interior of the province, and in any event he had not yet been authorized by British Columbia to act in the Williams Lake area. Given the extent of the area Sproat was required to cover, he requested McGuckin to ask the Indians to continue to exercise patience and to assure them that, although their land questions could not be dealt with immediately, he would attend to them in due course.[104]

In the meantime, Sproat forwarded McGuckin's letter to Provincial Secretary Elliott, suggesting that it was within the province's power to calm the discontent at Williams Lake by making interim land allotments to the Indians pending the Commissioner's arrival in the area:

> If the Indians of Williams Lake took possession, as is apprehended, of the lands and crops of white settlers, an embarrassing situation would be created, not only there, but in every part of the province.... It does not appear to be necessary that such danger should be incurred, because if they think fit the Provincial Government, in cases where justice and expediency require that steps should be taken to satisfy the Indians, may give them lands, in anticipation of the visit of the Reserve Commissioner, but of course subject to his review.[105]

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[103] "Memorandum regarding Indian [Lands]," undated, NA, RG 10, vol. 3663, file 9803 (ICC Documents, pp. 37–38); Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, pp. 37–38 (ICC Exhibit 3c).

[104] Gilbert Malcolm Sproat, Indian Reserve Commissioner, to Rev. J.M. McGuckin, OMI, St Joseph's Mission, May 6, 1878, NA, RG 10, vol. 3663, file 9803 (ICC Documents, pp. 46–47).

[105] Gilbert Malcolm Sproat, Indian Reserve Commissioner, to A.C. Elliott, Provincial Secretary, May 6, 1878, NA, RG 10, vol. 3663, file 9803 (ICC Documents, pp. 44–45).

Sproat openly criticized the provincial government for its failure to support the process of reserve allotment and its ongoing alienation of lands to white settlers without regard for Indian interests:

> I respectfully beg leave to mention to you, for the information of His Honor the Lieut[enant] Governor in Council, that my advices from the southern interior of the mainland show that the Indians in that part of the country are again becoming discontented.
>
> Several of the tribes whose land questions were adjusted last year, and whom the Commissioners left in good humour, have refused presents from the Dominion Government and freely discuss the right of the Queen to give away land to white settlers without having extinguished the Indian title.
>
> The causes of this change of feeling, so far as I can judge, are:
>
> (1) The delay of the Indian Reserve Commission in resuming work among those Indians. This is resented both by those who are not settled with, and those who were settled with. The former now say that the latter have sold themselves to the Queen as slaves by accepting a settlement of their land question.
> (2) The omission, in the speech of His Honor the Lieut[enant] Governor at the opening of the late session, to state that the land question of the Indians would still have attention, though the Indian Reserve Commission was to be dissolved ...
>
> It is, therefore, possible that even greater difficulties will have to be encountered this year than last year – difficulties which should not have been allowed to have arisen.
>
> I mention these matters to show the pressing necessity for everything being done, with promptness and decision, on the part of the Provincial Government, to facilitate the progress of the work of adjusting the Reserves ...[106]

The following year, the Indians at Canoe Creek, Dog Creek, Alkali Lake, and Williams Lake approached the local Justice of the Peace, William Laing-Meason, for assistance in having their claims addressed. Laing-Meason in turn wrote to Sproat on March 7, 1879:

> The Indians in this vicinity have requested me to address you in their names, and to explain to you how much [they] are in need of more agricultural land ...
> At Canoe Creek – The Indian Reserve does not contain more than 1/2 an acre to each [adult].
> At Dog Creek – The Tribe is small but the reserve is too small in proportion.
> At Alkali Lake – The land is nearly as small in proportion to the number of Indians as that of Canoe Creek.

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[106] Gilbert Malcolm Sproat, Indian Reserve Commissioner, to A.C. Elliott, Provincial Secretary, May 6, 1878, NA, RG 10, vol. 3665, file 9803 (ICC Documents, pp. 40-41 and 45).

> At Williams Lake – There is no Indian Reserve, and the Indians do not own a single [acre] of land. They are living on land belonging to the Catholic Mission of that place....
>
> All the above Indians are very discontented on account of the Commission not having visited them before this time.
>
> I have tried to explain to them that the Commission had not time to come here last year, and that they would certainly not be neglected, but it is impossible to make them understand such reasons.
>
> If it is in your power to send the above tribes some assurance that you will visit them this season it would, I feel sure, help much to remove the great discontent which at present exists among them.[107]

In April, after a meeting with the Chief of the Williams Lake Band, Laing-Meason wrote again to Sproat, warning him that the Indians in that area were becoming desperate:

> The Chief of this tribe has just requested me – in the most formal manner – to write to you and say:
>
> 1. That unless you come up and give them land owner before 2 months from date, we may look out for trouble.
>
> 2. That his tribe has nothing to cut, in consequence of their having no land on which to raise crops.
>
> 3. That their horses & cattle here – many of them died this winter because they had no place of their own on wh[ich] to cut hay last [summer].
>
> Their talk – I am well informed – is that if proper land is not given to them, they will take by force the land wh[ich] they used to own & wh[ich] they used to cultivate, and wh[ich] was taken from them by pre-emption in 1861 (about). This land is situate at the [foot] of Williams Lake, & is [now] owned by Mr. Pinchbeck. There are Indian houses to be seen on it at the present time....
>
> The Soda Creek and Alkali Lake tribes will join with these if there is trouble – this from the Indians themselves.[108]

Sproat knew that the Indians in British Columbia's northern interior were in urgent need of land, given that those at Williams Lake had no land at all and others at Bonaparte, Canoe Creek, Dog Creek, Alkali Lake, and Soda Creek had "small reserves at present of an extremely sterile soil." He acknowledged that, although considerable land was available, little was capable of being irrigated without great expense and labour. In his view, most of the good land and the water required to irrigate it had been acquired by white settlers through the provincial government's failure to protect Indian interests, and he believed that the province should provide redress. Accordingly, although the provincial government wanted Sproat to focus his efforts in the northern interior to avert the possibility of rebellion, he was reluctant to visit bands in that area because he believed it would be premature to set apart lands there without an arrangement with the provincial government on the question of irrigation.[109] Deputy Superintendent General of Indian Affairs Lawrence Vankoughnet agreed, and directed Sproat to proceed with allotting reserves on the coast, leaving the northern interior to be dealt with once the province, which had already been sitting on the matter for a year, had established how water could be made available for irrigation purposes.[110]

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[107] William Laing-Meason, Justice of the Peace, to Gilbert Malcolm Sproat, Indian Reserve Commissioner, March 7, 1879, NA, RG 10, vol. 3665, file 9803, part 1 (ICC Documents, pp. 51–52).

[108] William Laing-Meason, Justice of the Peace, to Gilbert Malcolm Sproat, Indian Reserve Commissioner, April 21, 1879, NA, RG 10, vol. 3665, file 9803, part 1 (ICC Documents, pp. 54–56).

On the question of how much land the Indians required to provide for their herds, Sproat reported to Superintendent Powell on February 28, 1880:

> ... in reference to the important question therein discussed as the gross area required for Cattle. I beg to enclose copy of an official letter from the Magistrate at Lytton to the Governor dated 25th July 1865 showing that at that time, when the bunch grass generally was not greatly eaten off, 30 acres per head were necessary, in the opinion of Mr Chapot of Lytton [a butcher and cattle owner], and 50 acres per head were necessary in the opinion of the Messrs Cornwall.
>
> Much of the land assigned by me is inferior to the land at Hat Creek, so far as I can ascertain, and if the above were taken as standard the acreage of most of the Reserves would require to be increased but the whole question is one of much difficulty and very numerous conflicting opinions. I have done the best I could in my own judgment in each case.[111]

Considered in retrospect, Sproat's closing words in his own defence suggest that he may have realized his days as the Indian Reserve Commissioner were numbered. Over the years, Sproat had gained considerable sympathy for the plight of British Columbia's Indians and became more critical of provincial Indian policy, concluding that "the reversal of Douglas's policies was at the root of the current Indian dissatisfaction."[112] By way of contrast, "[a]lthough Indians were never given as much land by the commission as they could have pre-empted if they were white, many settlers complained that Indians were being treated too generously" or that their lands were devalued by the creation of adjacent reserves.[113] It is not clear whether Sproat resigned voluntarily on March 5, 1880, but there is no doubt that the provincial government's intransigence and unwillingness to approve reserves laid out by him thwarted his efforts on the Indians' behalf. Four months later, on July 19, 1880, Peter O'Reilly succeeded Sproat as Commissioner.

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[109] Gilbert Malcolm Sproat, Indian Reserve Commissioner, to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, November 26, 1879, NA, RG 10, vol. 1274, with attached newspaper clipping of a letter written by Archibald McKinlay, Indian Reserve Commissioner, to Victoria *Colonist*, November 7, 1879 (ICC Documents, pp. 60-61).

[110] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Gilbert Malcolm Sproat, Indian Reserve Commissioner, May 19, 1879, NA, RG 10, vol. 3665, file 9803, part 1 (ICC Documents, pp. 57-59).

[111] Gilbert Malcolm Sproat, Indian Reserve Commissioner, to I.W. Powell, Indian Superintendent, February 28, 1880, NA, RG 10, vol. 1274 (ICC Documents, pp. 66-67).

Reserve Allotments at Alkali Lake

A county court judge and stipendiary magistrate, O'Reilly was recommended for the position of Commissioner by his brother-in-law, Joseph Trutch, who was then the dominion agent in British Columbia on railway matters and as such retained an advisory role in Indian matters.[114] O'Reilly had participated in reserve allocation under Trutch before British Columbia's union with Canada and his appointment clearly suited the settler community, given "the fact that the Indians had made strong complaints about nearly every reserve that he laid out as a magistrate during the colonial period."[115]

O'Reilly's terms of reference as Indian Reserve Commissioner differed from those of his predecessor. Sproat had reported to Indian Superintendent Powell, but O'Reilly was to "act on his own discretion," guided by and subject to the confirmation of Powell and the province's Chief Commissioner of Lands and Works "as to the particular points to be visited, and Reserves to be established." Disagreements were to be referred to the Lieutenant Governor, whose decisions were to be final and binding.[116]

In a letter dated August 9, 1880, the Department of Indian Affairs provided O'Reilly with the following additional instructions:

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[112] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 189.

[113] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 195.

[114] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 199.

[115] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 136; Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 199.

[116] John J. McGee, Assistant Clerk, Privy Council, "Report of a Committee of the Honorable the Privy Council approved by His Excellency the Governor General in Council," July 19, 1880 (ICC Documents, pp. 68-70).

> In allotting reserve lands to each Band you should be guided generally by the spirit of the terms of Union between the Dominion and local Governments which contemplated a "liberal policy" being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> You should assure the Indians of the anxious desire of the Government to deal justly and liberally with them in the settlement of their Reserves as well as in all other matters; informing them also that the aim and object of the Government is to assist them to raise themselves in the social and moral scale so as ultimately to enjoy all the privileges and advantages enjoyed by their White fellow subjects...
>
> The Government consider it of paramount importance that in the settlement of the land question nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places, and fishing stations occupied by them and to which they may be specially attached ... You should in making allotments of lands for Reserves make no attempt to cause any violent, or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in, you should on the contrary encourage them in any branch of industry in which you find them so engaged.[117]

O'Reilly was also directed to make "ample provision of water" for the Indians.[118]

In the summer of 1881, O'Reilly at last arrived in Alkali Lake to allot reserves, but he quickly found that most of the good land had already been pre-empted or purchased by settlers.[119] After learning from Father Grandidier on July 11 that Justice of the Peace Laing-Meason might know of "some place that would be suitable" for the Band, O'Reilly wrote to Laing-Meason the following day to solicit his assistance, "knowing that you have taken an interest in the well being of the Indians in this part of the country."[120] Within three days O'Reilly's work was done. He prepared Minutes of Decision dated July 15, 1881, including descriptions and sketch plans of the seven reserves he had been able to set apart, followed four months later by his complete report of November 28, 1881:

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[117] Department of Indian Affairs to Peter O'Reilly, Indian Reserve Commissioner, August 9, 1880, NA, RG 10, vol. 3716, file 22195, as quoted in ICC, *Inquiry into the Claim of the Homalco Indian Band – Aupe Indian Reserves Nos. 6 & 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89 at 109-10.

[118] Department of Indian Affairs to Peter O'Reilly, Indian Reserve Commissioner, August 9, 1880, NA, RG 10, vol. 3716, file 22195, as quoted in ICC, *Inquiry into the Claim of the Homalco Indian Band – Aupe Indian Reserves Nos. 6 & 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89 at 110.

[119] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861-1923," prepared for the Alkali Lake Band, October 18, 1992, p. 41 (ICC Exhibit 5c).

[120] Peter O'Reilly, Indian Reserve Commissioner, to William Laing-Meason, Justice of the Peace, July 12, 1881, NA, RG 10, vol. 12758 (ICC Documents, p. 74).

> I have the honor to inform you that on the 15th July last I completed the alotment [sic] of lands for the Tribe of Indians residing at Alkali Lake on the Fraser River.
>
> *The District of Country is for the most part barren and destitute of water consequently I experienced much difficulty in selecting even a limited quantity of land suitable for agricultural purposes*
>
> *The best locations have for years past been occupied by white settlers, to the exclusion of the Indians and these parties have since obtained Crown grants from the Provincial Government, therefore it was not in my power to interfere with their titles*
>
> The Indians of Alkali Lake possess 561 Horses besides 123 Cattle and 69 Sheep, *their great desire was to obtain as much hay land as possible, to satisfy their just requirements it became necessary to make six (6) separate reservations amounting in all to about 3310* Acres [plus 5 acres in IR 7, the fishing station] *and this embraces all the good land in the neighbourhood, not already alienated* (See enclosed rough plans)
>
> No. 1. [A Reserve of 590 acres situated on Alkali Lake Creek, adjoining the farm of Mr. H. Bowie....] On which the Village stands, includes the original reservation of 40 Acres as shewn by the Land Records of the district, though the description of it is very imperfect, and without date. This I have enlarged by the additon of 550 Acres, it now includes a sufficient quantity of valuable timber, but only ninety (90) Acres available for agricultural purposes which unfortunately cannot be increased, as *the reserve is hemmed in on the North, East, and South, by Mountains, and on the West by the Farm of Mr. Bowie, he pre-empted in 1861, and has since obtained his Crown grant; his farm includes all the good land in the Valley as far as Alkali Lake, and should never have been disposed of until the Indian claims were defined.*
>
> I have set aside 100 inches of water for this reserve to be taken from Alkali Lake Creek.
>
> No. 2 [A Reserve of 800 acres situated on the trail between Alkali Lake and Williams Lake about three miles from the Indian Village....] Contains 800 Acres[,] [it is situated on the Mountain North East of the Village; the north fork of Alkali Lake Creek runs through it, and it is valuable as a dairy farm, being principally covered with bunch grass. An effort has been made to cultivate 60 Acres which has been fenced and irrigated by means of a ditch constructed by the Indians, but it is doubtful if farming can be carried on to advantage at this elevation.
>
> No. 3 [A Reserve of 180 acres situated on the North fork of Alkali Lake Creek, about five miles from the Indian Village....] Lies still further up the Mountain on the same Creek, and contains 180 Acres. It is valuable, as it is well watered, and capable of producing a large quantity of swamp hay.
>
> The Indians for years past, have been in the habit of wintering a portion of their stock here, and have built stabling and cor[r]als.
>
> No. 4. [A Reserve of 540 acres situated on the middle fork of Alkali Lake Creek about 6 miles East of the Village....] Is situated on the middle forks of Alkali Lake Creek,

about 6 miles East of the Village, and contains 540 Acres, embracing hay and grazing lands with a few acres of good timber. Here the Indians have endeavoured to cultivate on a small scale, but without success, the frost having destroyed the Crop before it reached maturity, this Reserve is also well watered.

No. 5. [A Reserve situated at the foot of a Lake known as Alixton Lake, containing 200 acres and about 4 miles East of the Village....] Contains 200 Acres, 75 of which is good swamp land, and this Area may be considerably increased at a small outlay, by cutting away the beaver dams which at present obstruct the stream; the remainder is grassy land thickly timbered with cottonwood and black pine.

A good stream of water flows the entire length of this reserve.

No. 6. [A Reserve known as Wycott flat situated on the left bank of Fraser River, about 19 miles from Alkali Lake, and containing 1000 acres approximately....]Known as Wycotts flat is situated on the banks of the Fraser River about 19 miles below Alkali Lake, and contains 1000 Acres. It is the favorite winter run for the horses belonging to the Indians from the fact that the snow soon disappears from it, and land being much broken by deep ravines affords shelter from the prevailing winds.

Some 250 Acres is good level land, and capable of being converted into a valuable farm, should it be found possible to bring in a supply of water, a work which the Indians are most anxious to undertake. With this object in view I have reserved the entire body of water known as Harper's Lake, about [illegible] miles East of the reserve, and at an altitude of at least 1000 feet above the flat. When it is remembered that these Indians possess, as previously stated, less than 100 acres of cultivable land, it will be seen how important it is to assist them in this undertaking, and I am of opinion that a survey should be made by a competent Engineer, and if found feasible that the Government should further assist by furnishing the tools, a superintendent of the work, and possibly a sawyer, the Indians providing the labor. I have estimated that the whole work including a small dam at the outlet of the Lake should be completed within two months at a cost to the Government of say $750.00 to $1000.00.

These Indians appear to be industrious and have shown a desire to cultivate every possible acre of land. They have assured me that they will supply all the labor necessary to carry out the above undertaking, and I think it would be more desirable to assist them in this way, than by purchasing a farm for them. Mr. W. Laing Meason who resides in the immediate neighbourhood, and takes very great interest in all matters affecting the Indians, stated to me that he had very considerable experience in the construction of mining ditches, and that he would be willing to undertake the superintendence of this work, having lived for a long period at this part of the Country he possesses a knowledge of the Indians, is respected by them, and would therefore be more likely to direct their labor successfully than a stranger.

I have also reserved for this tribe, two important fisheries.... [A Fishing Reserve [IR 7] situated on the North shore of Lac la Hache, between the 122nd and 123 mile posts on the Cariboo Wagon Road, and containing about 3 acres.... [as well as] the exclusive right to fish on the left bank of the Fraser River, from the mouth of the Chilcotin river, to the mouth of Little Dog Creek, an approximate distance of 4 miles.]

> The population of this tribe consists of 46 men, 45 women, and 88 children making a total of 179, of whom Philip is Chief. They are possessed of 561 Horses, 123 Cattle, 69 Sheep and 15 Pigs.[121]

A few key points emerge from this report. First, the 590 acres in IR 1 included the 40-acre reserve set apart in 1861 by A.C. Elliott. Second, the district was "barren and destitute of water," making it difficult for O'Reilly to select "even a limited quantity of land suitable for agricultural purposes."

Third, most of the good lands had already been pre-empted or purchased from the province by settlers, with whose titles O'Reilly was not permitted to interfere, although in O'Reilly's view those lands should not have been alienated until the interests of the Indians in the area had been defined; in a later report dealing with the Indians at Dog Lake, O'Reilly used Alkali Lake as his example of lands that were "arid, broken and barren with but few exceptions, and as almost all these have been purchased from the local Government in years gone by, there remains but very little land of value to assign for the use of the Indians."[122] In addition, although O'Reilly's report did not address the issue, other lands may have been unavailable for reserve purposes because they were subject to grazing permits or haying leases for terms of five or ten years in favour of local ranchers such as Bowie and Laing-Meason.[123]

Fourth, the reserves defined by O'Reilly embraced all the remaining good land in the area not already alienated.

Finally, although IR 6 (Wycott's Flat) had been used as a favourite winter run for the Band's horses, its use for other purposes hinged on the ability to supply it with water. In his instructions of May 11, 1882, to the surveyors who were to define, mark, and document the reserves sketched by him, O'Reilly directed them to take levels for the proposed irrigation ditch from Harper's Lake to Wycott's Flat and to report on the feasibility and estimated cost of conveying water to the reserve.[124]

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[121] Peter O'Reilly, Indian Reserve Commissioner, to Superintendent General of Indian Affairs, November 28, 1881, NA, RG 10, vol. 3665, file 9803; British Columbia Archives and Records Service (BCARS), B1391 (ICC Documents, pp. 88-95). Emphasis added. The portions of the reserve descriptions set apart in brackets are from O'Reilly's Minutes of Decision dated July 15, 1881 (ICC Documents, pp. 76-80).

[122] Peter O'Reilly, Indian Reserve Commissioner, to Superintendent General of Indian Affairs, December 2, 1881 (ICC Documents, p. 95).

[123] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861-1923," prepared for the Alkali Lake Band, October 15, 1992, pp. 46-47 (ICC Exhibit 5C).

[124] Peter O'Reilly, Indian Reserve Commissioner, to Messrs. Morrison & Jemmett, Surveyors of Indian Reserves, May 11, 1882, NA, RG 10, vol. 1275 (ICC Documents, pp. 98-99).

W.S. Jemmett completed the survey in 1883, including a tracing showing a hay meadow on the Indian sleigh road that the Alkali Lake people "were accustomed to use" but which had not been reserved for the Band.[125] Nothing further had come of this hay meadow, however, when the Chief Commissioner of Lands and Works approved the field books and plots of the reserves on June 4, 1884.[126]

The Alkali Lake reserves as finally surveyed increased from the 3,313 acres proposed by O'Reilly to 3,587.5 acres (see Appendix B). Reviews of O'Reilly's work at Alkali Lake and elsewhere are mixed, however. According to George Shankel, O'Reilly's own reports indicate that he took "infinite pains ... to consult the Indians fully before marking out reserves ... how he often allowed even more than they asked for," and how "all idea of large territorial reserves was completely abandoned," with "[e]very little place indicated by the Indians ... set aside."[127] The multiple reserves set apart for the Alkali Lake Band confirm at least the last of these remarks. Robin Fisher is less charitable to O'Reilly:

> At Soda Creek, for example, a reluctant chief was told that he had better take what land was offered to him as the commissioner had to leave the following day.... At Alkali Lake O'Reilly gave the Indians some land that had been left by settlers because it was impossible to irrigate. With decisions like these, it is not surprising that the provincial chief commissioner of land and works now felt that he could approve the reserves allocated by the reserve commissioner, and the premier was able to write to O'Reilly that since he had assumed the position, "a much fairer and more accurate appreciation of the duties and responsibilities of the office has been displayed."[128]

By managing to secure the approval of the Chief Commissioner of Lands and Works to his reserve selections throughout British Columbia, O'Reilly succeeded in one respect in which his predecessors had not. The Joint Commissioners had set aside 145 reserves comprising 186,704.99 acres for 5,158 Indians, or an average grant of 36.19 acres per capita. Sproat had followed by allotting 257 reserves totalling 105,462.38 acres for 3,566 Indians, or 29.57 acres per person. Not a single one of these reserves had been approved by 1885, and indeed 31 reserves amounting to 81,500 acres established by Sproat for 522 Indians in the Nicola Valley were not just ignored but rejected outright. By contrast, O'Reilly set apart 239 reserves embracing 216,840.90 acres for 8,634 Indians, averaging 25.1 acres per person, and all were accepted.[129]

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[125] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861-1925," prepared for the Alkali Lake Band, October 15, 1992, p. 50 (ICC Exhibit 5C).

[126] Peter O'Reilly, Indian Reserve Commissioner, to I.W. Powell, Indian Superintendent, June 4, 1884, NA, RG 10, vol. 1275, BCARS, B1391 (ICC Documents, p. 148).

[127] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 142.

[128] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 201.

Additional Reserve Selections at Alkali Lake

The Alkali Lake Band and others in the province were not satisfied with O'Reilly's reserve selections, in particular the shortage of agricultural and pasture lands resulting from pre-emptions, purchases, leases, and permits granted before Indian lands had been defined. They asked the provincial government to provide additional land, even if it had to be purchased back from white settlers. Premier William Smithe balked at this request, arguing that the Indians were the responsibility of the federal government and that the *Terms of Union* had not contemplated the province providing anything other than unimproved Crown lands for reserve purposes:

> The Indians at Alkali Lake, as well as at Soda and Canoe Creeks, certainly would seem to have urgent claims for relief at the hands of the Dominion Government; and I cannot but think that that Government have not fully realized their responsibilities in respect of the Indians who are in their charge. It is manifestly wrong that the Indians, whose guardianship the Federal Government assumed at Confederation, should be left, in some instances, to starve, simply because the Provincial Government cannot afford to do that which never ought to have been expected, never asked for at their hands, that is, to purchase improved property at high prices, and give it to the Dominion Government for Indian purposes. The Indians are a heavy burden to the Province as it is. It would not be an exaggeration to say that the cost of administration of justice is doubled to the Province on Indian account, and yet as wards of the Dominion they contribute nothing to the Provincial Treasury. It is quite different however with the Federal Government in that regard. The Indians are large consumers of goods upon which heavy duties are paid to the Dominion; and if there were no other or better reason, the fact that the Indians contribute more to the Exchequer of the Dominion than is expended on their behalf, ought to be sufficient to induce the Dominion Government to make such expenditure in the interest of their Indian wards as the circumstances demand.... [I]t is not fair to expect that [the Province] can take of its small

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[129] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 222 and 224.

> and inadequate revenue and purchase improved farms for either the Indians or the Dominion Government.[150]

In fact, most settlers still considered that even O'Reilly was too liberal in his reserve selections, complaining that much of the allotted land remained idle, unimproved, and unfenced. An 1884 petition to the province's Legislative Assembly requested that these "agricultural and timber lands be thrown open to settlers" for improvement, cultivation, and productive use of their resources, with the Indians "located on wild lands equally suitable for the purpose for which they require them."[151] The provincial government continued to withhold its consent to reserves established by the Joint Commissioners and Sproat. The delay rankled Indian Superintendent Powell, who believed that it undermined the Indians' trust in the good faith of the two governments, particularly since settlers had begun disregarding the reserves and pre-empting the unconfirmed lands, to the financial gain of the province.[152]

As for the Indians at Alkali Lake, Powell acknowledged on November 7, 1883, that they had been shortchanged in terms of reserve land:

> On the 14th [September, 1883] I recrossed the Fraser and arrived at Alkali Lake the same evening visiting Canoe and Dog Creek and arriving at Clendon by the river trail on the 18th.
>
> The Alkali Lake, Dog Creek and Canoe Creek tribes are poorly off, as compared with other Indians in the Province. Their lands are unsatisfactory, and many of them appeared discouraged; unfortunately, they can obtain liquor easily from licensed houses in the vicinity – a fact which brings home to them additional troubles. They complained in all their speeches of their neglected condition, and their inability to obtain sufficient from their lands to support themselves.... That Indians submit to such a mode of dealing with them speaks well for their peaceful proclivities, but the circumstance gives them increased claims for Justice and future protection.[153]

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[150] William Smithe, Premier of British Columbia, to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, April 11, 1884, British Columbia, *Sessional Papers*, 1885, p. 13, as cited in Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 218–19.

[151] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 142.

[152] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 214–15.

[153] I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, November 7, 1883, NA, RG 10, vol. 3665, file 9778, part 1 (ICC Documents, pp. 114–15).

During Powell's visit in 1883, Laing-Meason was appointed the first Indian agent for the area.[154]

The following year, recognizing the dearth of good land remaining available in the vicinity, Deputy Superintendent General Vankoughnet on October 16, 1884, instructed O'Reilly to lay off reserves for the Soda Creek, Canoe Creek, and Alkali Lake Bands "in some other locality than where these Indians usually reside, inasmuch as the Government of British Columbia have disposed of all the arable land in the part of the country frequented by these Indians."[155] But in the succeeding four years, O'Reilly proved unable or unwilling to comply, prompting Vankoughnet on July 27, 1888, to reissue his instruction "to select lands suitable for such purpose elsewhere and in as close proximity to the Indian settlements [of the Soda Creek, Alkali Lake, and other interior bands] as possible" where "land could not be had in the immediate vicinity of Indian settlements."[156] It appears that O'Reilly sought to use these instructions in a "creative" way to generate new solutions to the shortage of Indian lands in areas like Alkali Lake, but his efforts were quickly arrested by Forbes G. Vernon, the new Chief Commissioner of Lands and Works, on February 11, 1889:

> You will observe that there is no authority for the statement made in your letter, "that in event of suitable lands not being obtainable the Reserve Commissioner may allot blocks of land elsewhere with a view to their being afterwards disposed of and a fund created therefrom with which to purchase a farm or farms for the use of the Indians." Such an arrangement even if it had been agreed upon, would have been most difficult to carry out.
>
> Admitting that the Province is bound to provide sufficient lands for the requirements of the Native Tribes, it cannot be reasonably contended that it is bound to furnish Indian Tribes with improved farms....
>
> Should the Dominion Government prefer to purchase an improved farm for these Indians, the most that the Provincial Government could undertake to do, would be to refund to the Dominion Government the amount they had received from the sale of the land, but any arrangement of this kind should only apply in the case of ordinary country lands.

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[154] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, pp. 42 and 49 (ICC Exhibit 3C).

[155] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Peter O'Reilly, Indian Reserve Commissioner, October 16, 1884, NA, RG 10, vol. 11007 (ICC Documents, pp. 149–50).

[156] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Peter O'Reilly, Indian Reserve Commissioner, July 27, 1888, NA, RG 10, vol. 11007 (ICC Documents, pp. 149–50).

> Any value the property may have acquired over this amount would naturally arise from the buildings erected, cultivation, ditching, &c. and from which the Dominion Government and their wards would reap the sole benefit.[157]

In 1890, Powell retired and was replaced by A.W. Vowell as Indian Superintendent[158] while O'Reilly continued allotting reserves and reallocating or reducing lands previously allotted by Sproat and the Joint Commmissioners. British Columbia's Indians were dissatisfied, but the risk of uprising that seemed so tangible in the 1870s had faded by the late 1880s, when the population of the province's swelling settlement community, fuelled by the completion of the railway in 1886, finally eclipsed the declining numbers of Indians: "[a]ccording to the census of 1880, the Indians were still the majority of a total population of 49,459, but by 1891 the Indians constituted less than one-third of a total of 98,173."[159]

At Alkali Lake, the Indians became incensed when a settler named William Wright sought to pre-empt Crown lands containing meadows that the Indians had been using. As Indian Agent Laing-Meason reported on July 19, 1893:

> When Mr. O'Reilly laid out the Alkali Lake Reserve very few meadows were asked for, as only those Indians who had Cattle required hay; no sleighs or waggons being then used by the Indians and there being a sufficiency of grass in the immediate neighborhood of the Reserve for their saddle horses; at present the natural grass has all been [fed off] everywhere and hay is absolutely necessary even for saddle horses, but every Indian family now has its sleigh and span of horses [illegible] being stabled during the winter and of course require hay; it therefore becomes most desirable, and a [illegible] of act of justice, that they be [allowed] to [acquire] more meadow land; the [illegible] settlers of this neighborhood have hitherto [several illegible words] the Indians to meadows, there attempting to pre-empt or purchase such lands [as are]utilized by the Indians.
>
> The meadow in question was until last year a lake, this being drained has become a meadow which was cut [by the] Indians for the first time last year. They have since erected fencing and buildings and were preparing to cut this hay this summer when Mr. Wright pre-empted it; under the circumstances I beg to submit for your consideration the possibility of effecting some arrangement with the Provincial Government

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[157] F.G. Vernon, Chief Commissioner of Lands and Works, to Peter O'Reilly, Indian Reserve Commissioner, February 11, 1889 (ICC Documents, pp. 189-91).

[158] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 225.

[159] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: UBC Press, 1992), 200 and 202; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 136-37.

> whereby that meadow could be secured to the Indians and thus avoid what appears at present a matter likely to cause serious trouble.[140]

Chief August of the Alkali Lake Band appealed directly to Vowell on October 26, 1893, contending that the "biggest and best piece of land" set apart for the Band by O'Reilly in 1881 – Wycott's Flat – was of "no account to us, only for a short time in the winter for pasture as there is no water on it." For this reason, his people had for several years been cutting hay on Crown meadows where they had built houses and stables and had developed seven miles of road to access them. He expressed concern that the Band would be forced to dispose of its stock should it be deprived of those meadows, noting that, to add insult to injury, even Laing-Meason, who had apparently resigned as Indian Agent, had staked for his own purposes one of the meadows used by the Band.[141]

Two days later, the new Indian Agent, Gomer Johns, made a special trip to Alkali Lake and, with Chief August and other band members, toured the five reserves situated on Alkali Lake Creek:

> [O]n four of these, there is a little meadow land, but the total crop of hay is only about 50 Tons; – not 15 Tons as stated in August's letter – *their need of more meadow land is evidenced by the fact that for several years they have "put up" more hay on land outside of their Reserves than on their Reserves*; exclusive of the meadow preempted by Wright the quantity of hay "put up" outside the Reserves is about 60 Tons, but if we include that meadow – which is still in dispute as regards this year's crop – we have a total of about 140 Tons, as against 50 Tons obtained on the Reserves. I visited the Wright meadow and made a rough estimate of the amount of hay in the different stacks, the result being about 80 Tons; the Indians' estimate was much higher; 200 Tons could be obtained on this meadow if required; the assertion in Chief August's letter that his band of 200 people will starve if they lose this meadow, is, of course nonsense, but it will certainly be a very serious loss to them; *apart from the loss of the meadow itself, the disturbance caused by the intrusion of a white settler on a range practically enclosed by these 5 Reserves, will be a continual source of annoyance, besides the loss of pasturage of which hitherto they have had a monopoly*. I may here remark that the Reserves are for the most part fenced in.
>
> I am informed by Mr. Soues, Gov[ernment] Agent at Clinton, that Wright's preemption is dated 8th July/93 and that he obtained Leave of Absence for 3 months on the 2nd October; as a matter of fact Wright has never entered into occupation of the

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[140] William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, July 19, 1893 (ICC Documents, pp. 202–03).

[141] Chief August, Alkali Lake Band, to A.W. Vowell, Indian Superintendent, October 28, 1893 (ICC Documents, pp. 204–05).

> land as required by Clause 13 of the Land Act: apparently he intends to evade the requirements of the act as to residence, and to hold the place as a Hay Ranch the only thing for which it is adapted...
>
> I have strictly adhered to your instructions in your letter of the 5th October... in regard to encouraging Indians in asking for more land, &c.[142]

Vowell himself visited the Band on July 23, 1894, because of "the trouble .. likely to occur between the Alkali Lake Indians and a whiteman named Wright who had some time ago preempted a meadow used by these Indians for years for haying purposes." He reported to Deputy Superintendent General Hayter Reed on August 6:

> The meadow in question is about 14 miles from the village in an Easterly direction and situated in the mountains. Formerly they claim that for the most part the present meadow was a lake and that years ago they drained it.
>
> At present from 100 to 160 tons of wild hay can be cut upon it and it has been their custom to cut hay there and in the winter drive their cattle there and feed them; they have also for a distance of some seven miles cut a sleigh road through the timber to enable them when required to haul some of the hay to other places. They have also done some fencing around a portion of it, and have built some houses for winter use. I may also state that when on my way to the meadow above mentioned several smaller ones were brought to my notice where different members of the band have for years been cutting hay. They cut on these from 5 to 40 tons as the number of their cattle and horses require, and claim that such facilities for feeding their stock during the winter months is an absolute necessity, as the amount of hay possible to obtain from their reserves is insignificant when compared with their requirements. They have amongst them over 200 head of cattle besides many horses. When the reserves were allotted to them in July 1881 they had but very few cattle, but as the settlement of the surrounding country advances and their hunting grounds and earlier means of getting a livelihood become impaired, and as they have comparatively little cultivable land, their chief support centres in their cattle. The Indians requested me to report the circumstances above narrated and begged of me to try and secure the meadows for them as they cannot make their living without them, etc. I told them that I would report the matter and endeavor to procure these pieces of meadow land for them but at the same time impressed upon them that they should not attempt to interfere with the lawful rights of others, whiteman or Indian, and that at present the only land they could claim was that lawfully reserved for them. They were not unreasonable, but still kept strongly to the point that without the meadows they and their children would be without sufficient means for their support. For my own part I consider that their demands are worthy of consideration and I would strongly urge that all those patches of meadow lands situated in the mountains which have for years been used by them

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[142] Gomer Johns, Indian Agent, to A.W. Vowell, Indian Superintendent, November 17, 1893, NA, RG 10, vol. 3917, file 116524 (ICC Documents, pp. 206-11). Emphasis added.

> and which come under the head of "waste lands of the Crown" be reserved to them without delay. These lands being of limited area, and isolated, are not fitted for settlement other than by the Indians, but if not reserved may at any time by a designing person be preempted for the purpose of extorting money from, or giving trouble to, the natives to whom the meadows land may be a necessity. The Provincial Government will, I know, raise no objection to such a course, as it is inclined as far as my experience goes to act liberally in such matters.
>
> I may say that the Indians have promised not to interfere with Mr. Wright should he go to take possession, in the meantime the Chief and his people are going to make an effort to settle the matter amicably with Mr. Wright whereby they can still retain possession of the meadow, in which case it should be at once made an Indian Reserve ...[143]

Reed concurred with this recommendation.[144] As Robert Cail observes, Indians across the province were requesting additional land owing to their "awakening ... to the value of agricultural pursuits, their increasing herds of cattle, [and] their growing reliance on irrigation"; where good agricultural land was available, O'Reilly gave it to them, usually "in sections where ultimate conflict with white settlers might be avoided."[145] Indeed, during the summer of 1895, he set apart seven additional reserves for the Alkali Lake Band, highlighting their remote location in his report of September 20, 1895, with enclosed Minutes of Decision and sketches, to the province's Chief Commissioner of Lands and Works:

> The lands set apart are for the most part swamps situated on the mountain, they produce a limited quantity of wild hay.
>
> From the isolated position of these reserves they are not likely to interfere with the progress of the country, there are no white settlers in the immediate neighborhood.[146]

Six days later, O'Reilly elaborated on his selections in a letter to Reed:

> Though these Indians are already in possession of reserves allotted to them in 1881, and which contain 5587 acres [sic],[147] they have recently complained of a scarcity of hay land as their bands of cattle and horses have largely increased, and it

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[143] A.W. Vowell, Indian Superintendent, to Hayter Reed, Deputy Superintendent General of Indian Affairs, August 6, 1894 (ICC Documents, pp. 212–16).

[144] Hayter Reed, Deputy Superintendent General of Indian Affairs, to A.W. Vowell, Indian Superintendent, August 16, 1894 (ICC Documents, p. 218).

[145] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 225.

[146] Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, September 20, 1895 (ICC Documents, p. 219).

[147] As previously noted, the Band's first seven reserves actually comprised 3,587.5 acres.

> was with a view to supplying this want that my present visit to Alkali Lake was undertaken.
>
> The Chief "August" and large number of his people accompanied me to point out their several pieces of land which they desired to have secured to them. Mr. Agent Bell also was present and assisted much in the selection of the seven following locations.
>
> No. 8 Little Spring, a reserve of 480 acres, situated on the mountain about 1½ miles northeast of Reserve No. 2.
>
> The Indians have been in the habit of cutting hay from 20 acres of this land, but the area may, by a little labor, be enlarged to double that size.
>
> No. 9 Chudoicam situated ½ mile northeast of Little Spring reserve contains 1,000 acres. [400] acres are open swamp land from which the Indians obtain about 40 tons of good swamp hay.
>
> No. 10 Loon Lake reserve contains 500 acres. 175 are good swamp land the larger portion of which is used by the Indians for the purpose of obtaining hay.
>
> No. 11 Sampsons Meadow on the banks of Alkali Lake Creek contains 800 acres of which about 200 is swamp land. The Indians state that they cut 40 tons of hay on this meadow; they have also built a house and corrals where they winter their stock during inclement weather.
>
> No. 12 on Alkali Lake Creek, about a mile below Reserve No. 11, contains 500 acres of which 90 acres is swamp. There is little natural hay on this reserve; it can however be easily cleared of brush.
>
> No. 13 situated seven miles east of the Indian village, contains 1,400 acres, and includes three swamps from which a large quantity of hay is obtained. There is also excellent pasturage in the vicinity, and the surrounding country is well watered.
>
> No. 14 Ropers Meadow contains 80 acres and is situated about 2½ miles east of the Indian village. Although but a small reserve it is almost all meadow land, and yields an abundant supply of excellent hay.
>
> The meadow lands in all the above reserves are capable of being enlarged by clearing with a very small amount of [illegible] labor, the Indians at present only using those portions that are naturally free of brush; they are at too great an altitude to admit of their being used for any other purpose.[148]

With the addition of these 4,760 acres of level, thinly timbered land[149] to the existing reserves of 3,587.5 acres, the Band's holdings more than doubled to 8,347.5 acres. On September 20, 1897, O'Reilly instructed surveyor E.M. Skinner to mark off the reserves,[150] and by March 5, 1898, Vowell had received the plans, which he forwarded to British Columbia's Deputy Commissioner of Lands and Works for approval and signature.[151]

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[148] Peter O'Reilly, Indian Reserve Commissioner, to Hayter Reed, Deputy Superintendent General of Indian Affairs, September 26, 1895 (ICC Documents, pp. 220-21).

[149] Peter O'Reilly, Indian Reserve Commissioner, "Schedule of unsurveyed Indian Reserves," December 1896, NA, RG 10, vol. 1279 (ICC Documents, pp. 226-27).

[150] Peter O'Reilly, Indian Reserve Commissioner, to E.M. Skinner, Indian Reserves Surveyor, September 20, 1897 (ICC Documents, p. 228).

By the time O'Reilly retired as Commissioner on February 28, 1898, the total area of reserve land in the province had increased from 28,437 acres at union in 1871 to 718,568 acres, for an average of 30.42 acres per capita. But, as Brian Titley observes, not all of the land was suited to agriculture or grazing, its distribution among the Indians was "extremely uneven," and the per capita acreages appeared more generous than they actually were because the aboriginal population had declined to about half its 1871 level.[152] O'Reilly's duties were assumed by Vowell, but at that point the position entailed little more than "re-defining present reserves and allotting small areas as fishing stations, hay meadows, and gardens."[153]

Prelude to the McKenna-McBride Commission

Despite the efforts of the various Commissioners since 1876, British Columbia's Indians remained disenchanted with the failure of the federal and provincial governments to recognize their aboriginal title, to compensate them for its extinguishment, and to protect their reserve lands from encroachment by settlers.[154] In 1906, the Cowichan Indians sent a delegation to England to voice their concerns directly to King Edward.[155] But as British Columbia continued to prosper and grow, Indian reserves came to be viewed more and more by politicians in Victoria – and some in Ottawa, including Superintendent General Frank Oliver – as a "nuisance" and a "hindrance to development," since they were "too large for their owners, occupied some of the best agricultural land, and were rarely utilized to advantage."[156]

In 1907, the province's reversionary interest in reserve lands took on added significance. The federal government had received an offer from the Grand Trunk Pacific and Development Company for 13,519 acres of the Tsimpsean reserve near Metlakatla to be used for a railway terminus. The federal government asked British Columbia to waive its reversionary interest so that the project could proceed and the province's development would not be impeded. The province, however, denied the federal government's power to lease or transfer reserve lands, arguing that any lands so dealt with became the absolute property of the province. Canada contended that, if the province insisted on asserting its reversionary interest, no band would ever surrender land, and this would operate to the province's detriment. Although the federal government had formerly opposed the disposition of reserve lands, even if beyond the Indians' requirements, the rapid growth of western Canada during the Laurier years under Minister of the Interior Clifford Sifton had led to this policy being relaxed in the interests of development, particularly where revenues from such surrenders might reduce the cost of administering Indian affairs. In other parts of Canada, "excess lands were being sold annually."[157] Ultimately, "[w]hen British Columbia refused to abandon or sell its reversionary interest, Canada proceeded unilaterally with the surrender and sale."[158] The dispute lingered for several years and, with both sides angling towards litigation, the province's Chief Commissioner of Lands and Works, R.G. Tatlow, informed Vowell in early 1908:

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[151] A.W. Vowell, Indian Superintendent, to Deputy Commissioner of Lands and Works, March 7, 1898 (ICC Documents, p. 229).

[152] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 137.

[153] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 227.

[154] George Edgar Shankel, "The Development of Indian Policy in British Columbia" (unpublished doctoral thesis, University of Washington, August 1, 1945), p. 193; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 139.

[155] George Edgar Shankel, "The Development of Indian Policy in British Columbia" (unpublished doctoral thesis, University of Washington, August 1, 1945), p. 193.

[156] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), p. 138.

> Owing to the unsatisfactory state of affairs between the Dominion and the Province in relation to the question of Indian Reserves, the Executive considers it inadvisable in the meantime to make further allotments, but will be prepared to consider any application by the Department for the purchase, or deal with suitable exchanges.[159]

Receiving this message was one of Vowell's last official acts. By 1909 he was 68 years old and felt he was "not equal to anything bordering on rough trips or exposure."[160] Upon his retirement in 1910, his two roles as Indian Superintendent and Reserve Commissioner were abolished.[161]

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[157] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 230.

[158] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 138–39; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, pp. 214 and 217–19.

[159] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 227; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 145.

[160] A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, November 10, 1909, NA, RG 10, vol. 3829, file 61939, as referred to in ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 217.

[161] ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 217.

In 1909, the British Columbia government actively sought to reduce the reserve holdings of the Skeena Indians near Prince Rupert.[102] Predictably, this step led to agitation by the Indians to protect their rights, and they gained an ally with the creation of the Friends of the Indians of British Columbia, an organization of whites who sought to assist Indians in the settlement of their land claims.[103] As previous provincial leaders had done before him, Premier Richard McBride denied the existence of aboriginal title, and British Columbia referred to the province's Supreme Court "questions involving a denial of the title claim of the Indians."[104] In response, a delegation of three Indians, representing 20 tribes, petitioned the King to have the question submitted to the Judicial Committee of the Privy Council.[105]

Aboriginal activism continued to escalate in 1910. Both the Friends of the Indians and the Indians themselves approached McBride but again were rebuffed. Prime Minister Sir Wilfrid Laurier visited British Columbia that summer and met with contingents of Indians at Prince Rupert and Kamloops, where he stated that "the only way to settle this question that you have agitated for years is by a decision of the Judicial Committee, and I will take steps to help you."[106] In the meantime, the 1909 petition to the imperial government for relief from the Privy Council was referred by Britain back to Canada, where the Department of Justice recommended commencing judicial proceedings. The federal government opened negotiations with the province on the form of a reference to the Supreme Court of Canada, and succeeded in formulating 10 questions – three dealing with Indian title, and seven with the size of reserves. Although the questions had been tentatively approved by Canada's Deputy Attorney General, by counsel for British Columbia, and by Arthur O'Meara, a lawyer acting for some of the province's bands, McBride stubbornly refused to proceed with the reference unless the three title questions were omitted, insisting that, "so long as he headed the government of the province, the Indians had no title to the public lands of British Columbia."[107]

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[102] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 127–28.

[103] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 92.

[104] George Edgar Shankel, "The Development of Indian Policy in British Columbia" (unpublished doctoral thesis, University of Washington, August 1, 1945), p. 194.

[105] George Edgar Shankel, "The Development of Indian Policy in British Columbia" (unpublished doctoral thesis, University of Washington, August 1, 1945), p. 195.

[106] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 127. This statement became the third touchstone of the aboriginal title claim.

With the province not willing to participate in a judicial reference, the Laurier government considered other means of having the matter brought before the courts. On two occasions it passed amendments to the *Indian Act* to permit it to bring proceedings in the Exchequer Court to test the title claim on behalf of the Indians against a provincial grantee or licensee. The first amendment, enacted on May 4, 1910, as section 37A, stated:

> 37A. If the possession of any lands reserved or claimed to be reserved for the Indians is withheld, or if any such lands are adversely occupied or claimed by any person, or if any trespass is committed thereon, the possession may be recovered for the Indians, or the conflicting claims may be adjudged and determined, or damages may be recovered, in an action at the suit of His Majesty on behalf of the Indians, or of the band or tribe of Indians claiming possession or entitled to the declaration, relief or damages claimed.
>
> 2. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action.
>
> 3. Any such action may be instituted by information of the Attorney General of Canada upon the instructions of the Superintendent General of Indian Affairs.
>
> 4. Nothing in this section shall impair, abridge or in anywise affect any existing remedy or mode of procedure provided for cases, or any of them, to which this section applies.[108]

On May 19, 1911, the first subsection was amended to read as follows, with the changes shown in italics:

> 37A. If the possession of any lands reserved or claimed to be reserved for the Indians, *or of any lands of which the Indians or any Indian or any band or tribe of Indians claim the possession or any right of possession*, is withheld, or if any such lands are adversely occupied or claimed by any person, or if any trespass is committed thereon, the possession may be recovered for the Indians *or Indian or band or tribe of Indians*, or the conflicting claims may be adjudged and determined or damages may be recovered in an action at the suit of His Majesty on behalf of the Indians or of the band or tribe of Indians *entitled to or* claiming *the possession or right of* possession or entitled to *or claiming* the declaration, relief or damages.[109]

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[107] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 252; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 221.

[108] *Indian Act*, RSC 1906, c. 81, as amended by *An Act to amend the Indian Act*, SC 1910, c. 28, s. 1.

[109] *Indian Act*, RSC 1906, c. 81, as amended by *An Act to amend the Indian Act*, SC 1910, c. 28, s. 1, and by *An Act to amend the Indian Act*, SC 1911, c. 14, s. 4.

Unable to reach a negotiated settlement with the province, and uncertain whether it could force the British Columbia government into court,[170] the federal government announced on May 11, 1911, followed by an Order in Council to the same effect on May 17, that it intended to commence a test case against a provincial grantee or licensee under its new legislative amendments.[171] But politics intervened. In the autumn of 1911, the Laurier government fell to the new Conservative administration of Robert Borden, which decided to reopen negotiations on all aspects of the Indian question[172] but in particular on three critical issues: reserve size, the reversionary interest, and aboriginal title.[173] Borden appointed J.A.J. McKenna to investigate the Indians' land claims and to "represent the government of Canada in negotiating with the government of British Columbia a settlement of such questions."[174] McKenna quickly learned that the question of aboriginal title could not then be settled or litigated because McBride, fearing that the public interest would be injured if the courts threw doubt on the validity of land titles in the province, continued to refuse to negotiate or to permit a judicial reference.[175] The Premier considered that the Indians held no beneficial interest in their lands but a mere right of use and occupancy that reverted unburdened to the province "whenever the Indian right to any such lands or to any portion or portions thereof became extinguished through surrender, or cessation of use or occupation, or diminishment of numbers."[176] Accordingly, McKenna decided to drop that issue and to focus instead on the other two:

> His visits to Indians throughout British Columbia and his studies of the historical background of the difficulty led him to state in his report of October 26, 1912, that one of the greatest sources of dissatisfaction among the Indians was the provincial interest in their lands stemming from the 1875–76 Agreement [creating the Indian Reserve Commission]. As the Indians learned more of the settler's laws they realized

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[170] P.D. McTavish, Chairman, to Governor General of Canada in Council, "Memorial of the Conference of Friends of the Indians of British Columbia," November 4, 1912, NA, RG 10, vol. 11047, file 33/General, part 6.

[171] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, pp. 221–22; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 140.

[172] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 140.

[173] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 251.

[174] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 253.

[175] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 223; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 140.

[176] J.A.J. McKenna, Special Commissioner, to Robert Rogers, Minister of the Interior and Superintendent General of Indian Affairs, October 26, 1912 (ICC Documents, p. 247).

> that the tenure to their lands in the right of the Dominion was considerably less secure in British Columbia than elsewhere in Canada. In contrasting the treatment they had received by the two governments since 1871, it was apparent to the Indians that British Columbia had displayed much less sympathy with their claims than had the Dominion. Consequently, the insecurity by which the Dominion held the reserve lands distressed them greatly.[177]

With regard to reserve size, McKenna noted that the per capita average for all Indians in the province was about 33 acres, but he observed "a very striking inequality of allotment, the per capita allotment in one Indian Agency being under two acres, in another over one hundred and eighty four ... apart altogether from difference in values of lands allotted."[178]

To resolve the impasse, McKenna proposed a Royal Commission made up of representatives from both governments to address the two problems of reserve acreage and reversionary interest. "To this proposal McBride was amenable, and the McKenna-McBride Agreement, which laid down the terms of reference for the commission, was drawn up on September 24, 1912."[179]

THE MCKENNA-MCBRIDE COMMISSION

Terms of Reference

The terms of the McKenna-McBride Commission are central to this inquiry, and therefore it is essential to set them out in full:

> Whereas it is desirable *to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia*, therefore the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals *as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia:* –
>
> 1. A Commission shall be appointed as follows: Two Commissioners shall be named by the Dominion and two by the Province. The four Commissioners so named shall select a fifth Commissioner, who shall be the Chairman of the Board.
>
> *2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:*

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[177] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 233–34.

[178] J.A.J. McKenna, Special Commissioner, to Robert Rogers, Minister of the Interior and Superintendent General of Indian Affairs, October 26, 1912 (ICC Documents, p. 248).

[179] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 234.

(*a*) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.

(*b*) *At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians.* And they may set aside land for any Band of Indians for whom land has not already been reserved.

3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.

4. The lands which the Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the Province at public auction.

5. The net proceeds of all such sales shall be divided equally between the Province and the Dominion, and all moneys received by the Dominion under this Clause shall be held or used by the Dominion for the benefit of the Indians of British Columbia.

6. All expenses in connection with the Commission shall be shared by the Province and Dominion in equal proportions.

7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians, including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians, subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial boundaries of the Province which have been conveyed to the Dominion as aforesaid for such tribe or band, and not sold or disposed of as hereinbefore mentioned, or any unexpended funds being the proceeds of any Indian Reserve in the Province of British Columbia, shall be conveyed or repaid to the Province.

8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Reserve are required for right of way or other railway purposes, or for any Dominion or Provincial or Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall there-

> upon do everything necessary to carry the recommendations of the Commissioners into effect.[180]

By clause 2 of the agreement, the Commissioners were to add to or reduce reserve allotments, or indeed set apart land for bands without any reserves, to reflect the Indians' reasonable requirements; under sub-clause (a), reductions were to be carried out "with the consent of the Indians, as required by the Indian Act," a significant departure from the proclamation of December 23, 1876, that had permitted the Joint Reserve Commissioners as well as Sproat and O'Reilly to reduce reserves without obtaining surrenders. Just as significantly, clause 7 extinguished the province's reversionary interest "except in those rare cases where the Indians became extinct," leaving the federal government "free to deal with Indian land as it deemed best."[181]

The agreement and McKenna's report of October 26, 1912, were considered by the federal Privy Council on November 27, 1912. It adopted the recommendation of the Minister of Justice that, because the Crown's statutory authority to constitute the proposed commission was to be found in the *Inquiries Act*,

> the approval of the agreement should be subject to a further provision which should be accepted by the Government of British Columbia before the agreement can become effective providing that *notwithstanding anything in the agreement contained*[,] *the acts and proceedings of the Commission shall be subject to the approval of the two Governments*, and that the Governments agree to consider favourably the reports, whether final or interim, of the Commission with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the agreement in accordance with its true intent and purpose.[182]

British Columbia's Executive Council approved the agreement, subject to the same recommendation, on December 31, 1912.[183]

On March 31, 1913, the federal government selected McKenna and N.W. White of Nova Scotia as its appointees to the Royal Commission, and the province chose J.P. Shaw, the MLA for Shuswap, and D.H. Macdowall of Victoria. Former Saskatchewan Chief Justice E.L. Wetmore was named chairman, and, on April 25, 1913, the Royal Commission was formally constituted by letters patent.[184] J.G.H. Bergeron was appointed as the Royal Commission's first secretary and solicitor, assisted by C.H. Gibbons.[185]

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[180] "Memorandum of an Agreement arrived at between J.A.J. McKenna, Special Commissioner appointed by the Dominion Government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, as Premier of the Province of British Columbia," September 24, 1912 (ICC Documents, pp. 238-45). Emphasis added.

[181] George Edgar Shankel, "The Development of Indian Policy in British Columbia" (unpublished doctoral thesis, University of Washington, August 1, 1945), p. 224.

[182] Order in Council PC 3277 (Canada), November 27, 1912 (ICC Documents, pp. 249-50).

[183] Order in Council 1341 (British Columbia), December 31, 1912 (ICC Documents, pp. 254-55).

The following month, in a resolution dated May 20, 1913, directed to both the federal and the provincial governments, the Commissioners anticipated "that many matters and questions extraneous to the agreement will be brought before the Commission" and expressed a willingness to undertake a larger role than that set out:

> BE IT RESOLVED that it be intimated to the Governments of the Dominion and the Province that if they so desire and instruct the Commission, the Board will be pleased to deal with all such questions and matters and report, submitting suggestions as to the action to be taken and the policy followed.[186]

By Order in Council PC 1401, however, the federal government limited the Commission to the terms of reference set forth in the McKenna-McBride Agreement, although the government stated its willingness to receive a general report from the Commission on "Indian conditions and progress":

> The Minister observes that it is clear that the agreement between the representatives of the Province of British Columbia and the Dominion does not contemplate an investigation and settlement of matters appertaining to general Indian policy in British Columbia. It is confined to matters affecting Indian lands which require adjustment between the parties.
>
> The Minister is of the opinion that it would be inadvisable to burden the Commission with the investigation of all matters that might be brought to their attention by Indians, many of which would be of slight importance not affecting the relations of the two Governments. Unless great care were taken misconception might arise in the minds of the Indians as to the action of the Commission if authorized to make a general investigation; *the Commission having power to deal finally with all matters mentioned in the agreement subject to the approval of the two Governments*, but having only instructions to report and make suggestions as to other matters.
>
> The Minister submits that the Commission would, however, during its sittings in different districts of the Province obtain valuable information as to Indian conditions

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[184] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 235.

[185] *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria: Acme Press, Limited, 1916), 18.

[186] Minutes of a meeting of the Royal Commission on Indian Affairs in British Columbia, May 20, 1913 (ICC Documents, pp. 258-59).

> and progress and would probably form distinct opinions on these points and on the future policy which should be adopted by the Dominion Government towards the Indians of British Columbia.
>
> The Minister, therefore, recommends that the Commission be restricted in action to the terms of the agreement but that the Commission be informed that this Government would be prepared to receive a general report on the condition of the Indians with suggestions as to the future policy and administration of Indian Affairs in the Province of British Columbia, *the Indians being distinctly advised concerning the scope of the enquiry under the agreement* and that the Commission will merely convey to the Government the views of the Indians respecting any matters extraneous to the agreement brought to their attention.[187]

The Aboriginal Title Issue

Strictly speaking, issues based on aboriginal title fall outside the Specific Claims Policy and thus beyond the mandate of the Indian Claims Commission. However, when the McKenna-McBride Commission conducted its investigations into the reserve requirements of British Columbia's aboriginal population, the province's Indians concurrently agitated to have their aboriginal title claims heard, arguing that the two issues were inextricably interwoven. For this reason, it becomes necessary for us to consider briefly the nature of the claims being made at that time and their relationship to the work of the Royal Commission.

During the summers of 1913 through 1915, the Commissioners visited all of British Columbia's bands and reserves, explained their objectives, powers, and the restrictions imposed on them, heard the views of the Indians "on all matters connected with the work of the Commission," and, unless the Indians declined to be sworn, examined them under oath. "They also found time to listen to white farmers, municipal governments, railway companies, and other organizations that coveted Indian land."[188] The Commissioners were typically accompanied and assisted by the district inspectors and Indian agents of the respective agencies, "who provided local knowledge of persons and places."[189]

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[187] Order in Council PC 1401 (Canada), June 10, 1913 (ICC Documents, pp. 260-61). Emphasis added.

[188] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 141.

[189] *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria: Acme Press Limited, 1916), 18; E.L. Wetmore, Chairman, Royal Commission on Indian Affairs for the Province of British Columbia, to W.J. Roche, Superintendent General of Indian Affairs, "Progress Report No. 1," November 26, 1913, in *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria: Acme Press Limited, 1916), 142; ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 109 at 132-33.

The Indians were never entirely satisfied with the Commission's terms of reference, however. In a statement dated January 22, 1913, the Nishga Tribe applauded the agreement for resolving in large measure British Columbia's reversionary claim to reserve lands, since "[t]hey could now feel secure on their lands, a security never before possible."[140] But the agreement as a whole remained unacceptable to them because of its apparent intent to finally adjust all differences between Canada and British Columbia respecting Indian lands and Indian affairs generally in the province. The Nishga were not prepared to concede that the two governments had power "by the agreement in question or any other agreement to dispose of the so-called Reserves or any other lands of British Columbia, until the territory of each nation or tribe has been purchased by the Crown, as required by the Proclamation of [1763]." They denied the validity of every transaction by which the provincial government had purported, over the Indians' oral and written protests and without surrender of their interests, to sell large tracts of lands claimed by them. More to the point, although they claimed the right to be compensated for those portions of their territory that they *agreed* to surrender, they further asserted the right to reserve for their own use and benefit other parts of their territory, including much of the land the province had already purported to sell.[141] In a separate petition dated May 20, 1913, the Indian Rights Association of British Columbia adopted a resolution questioning the impartiality of the Royal Commission and recommending that each band challenge the Commission to first settle the "fundamental question" of title to unsurrendered lands before dealing with the rearrangement of reserves.[142] Despite being asked on many occasions to consider aboriginal title, however, the Commissioners refused to do so because the issue was beyond the scope of their mandate.[143]

In response to the Nishga statement, which had been referred to him by Minister of the Interior W.J. Roche, Minister of Justice Charles J. Doherty on December 17, 1913, questioned whether the *Royal Proclamation of 1763*, issued at "a time ... long antecedent to the colonization, or even, it may be said, the discovery of British Columbia," related at all to the Indians of the province. He also doubted whether the Judicial Committee of Britain's Privy Council would be prepared to entertain the Indians' claim since the new amendments to the *Indian Act* furnished a remedy available within Canada's own judicial system. However, given the recital in the McKenna-McBride Agreement that its terms were to form the basis of the "final adjustment of all matters relating to Indian affairs in the province," Doherty considered that, depending on the policy the government chose to pursue, a judicial reference dealing with aboriginal title might be inappropriate:

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[140] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 238.

[141] W.J. Lincoln, Chairman, "Statement of the Nishga Nation or Tribe of Indians," January 22, 1913, NA, RG 10, vol. 7750, file 901/3-8-1, part 1; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 141–42.

[142] Andrew Paull, Recording Secretary, and C.M. Tate, General Secretary, Indian Rights Association of British Columbia, to unidentified recipient, May 20, 1913, NA, RG 10, vol. 11047, file 33/General, part 6.

[143] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 141.

> The agreement, while it provides for the ascertainment of the various Indian reserves and the disposal thereof, or confirmation of the titles in the manner therein provided, makes no reference to the aboriginal title, and it may be considered that it would be incompatible with the intention of the agreement that the Dominion should maintain the cause of the Indians in respect of the aboriginal title, seeing that this title is ignored by the agreement and that the proposals or stipulations of the agreement are declared to have been agreed upon as a final adjustment of all matters relating to Indian affairs in the province.
>
> I think, therefore, that the policy of the Government in relation to the matter is a preliminary question to be determined. If the Government proposes to maintain the claim of the Indians, it would be advisable to institute proceedings in a proper case under the statute to which I have referred, and the case could then be carried if necessary on appeal to the Judicial Committee with the advantage of the opinions of the local courts as in ordinary cases. If the Government do not propose to uphold the claim, I think that the inadvisability of making any reference of this petition should be represented to the Colonial Office, and the Indians would in consequence presumably be left without any intervention or support from this Government, and in face of the deliberate opposition of the Government of British Columbia, to pursue such legal remedies on their own behalf and at their own expense as the very meagre prospects of the situation might afford.
>
> Upon the merits I think the Indian claim is a very doubtful one, but I am not prepared to say that it is not without sufficient foundation to justify consideration by the courts.[190]

It was at about this time that Duncan Campbell Scott became the new Deputy Superintendent General of Indian Affairs, and his involvement shaped the course of dealings with the Indians in British Columbia for the following 20 years. One of the first questions facing him was the matter of aboriginal title as formulated in the Nishga petition, and he found two main difficulties that had prevented the issue from being litigated: British Columbia's refusal to consent to a stated case including any reference to Indian title, and the uncertainty as to the extent of compensation to which the Indians might be entitled should they be successful and the Crown decided to proceed with extinguishing their title. Based on earlier decisions of the Privy Council that had described the Indian interest in land as "a personal usufructuary right dependent upon the good-will of the Sovereign," he proposed a reference to the Exchequer Court assuming that the Indian claim to compensation should contemplate only the value of land in its unimproved state:

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[190] Charles J. Doherty, Minister of Justice, to W.J. Roche, Minister of the Interior, December 17, 1913, in *Appendix to the Journals of the Senate of Canada, 1926–27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), 2–12.

> It follows that the Indian title, when acknowledged by the Crown, cannot be separated from what the Crown elects to grant. In appraising the Indian title we should go back to the time when the lands were a wilderness, when we find a wild people upon an unimproved estate. The Indian title cannot increase in value with civilized development; cession of Indian territory has always preceded the settlement of the country and whatever has been granted for the transfer has represented the good will of the Crown, not the intrinsic value of the land at the time of the cession, and assuredly not the value enhanced by the activities of a white population. From the earliest times this beneficial interest has ever been appraised by the Crown, the Indians accepting what was offered, with, upon occasion, slight alterations in terms previously fixed by the Crown. It is optional when, if at all, the Crown may proceed to extinguish the Indian title, and therefore, if it is decided that the Indians of British Columbia have a title of this nature there can be no claim for deferred benefit from the Crown.
>
> I would, therefore, propose that the claim be referred to the Exchequer Court with right of appeal to the Privy Council upon the following conditions:
>
> 1. That the Indians of British Columbia shall by their Chiefs or representatives, in a binding way, agree if the Court, or on appeal, the Privy Council decides that they have a title to lands of the Province, to surrender such title, receiving from the Dominion benefits to be granted for extinguishment of title in accordance with past usage of the Crown in satisfying the Indian claim to unsurrendered territories, and to accept the finding of the Royal Commission on Indian Affairs in British Columbia, as approved by the Governments of the Dominion and the Province as a full allotment of Reserve lands to be administered for their benefit as part of the compensation.
>
> 2. That the Province of British Columbia by granting the said reserves as approved shall be held to have satisfied all claims of the Indians against the Province.
>
> That the remaining considerations shall be provided and the cost thereof borne by the Government of the Dominion of Canada.
>
> 3. That the Government of British Columbia shall be represented by counsel, that the Indians shall be represented by counsel nominated and paid by the Dominion.
>
> 4. That, in the event of the Courts or the Privy Council deciding that the Indians have no title in the lands of the Province of British Columbia, the policy of the

> Dominion towards the Indians shall be governed by consideration of their interests and future development.[195]

Scott's proposal was adopted by Order in Council on June 20, 1914.[196] It immediately became contentious because clause 1, if approved by the Indians, would have required them to accept the extinguishment of their aboriginal title as well as the reserve allocations prescribed for them by the Royal Commission.

The Indians rejected Canada's offer, reasoning that it did not make sense for them to accept the first condition without some sort of guarantee that they would receive sufficient land to satisfy all their requirements. As the Indian Rights Association of British Columbia wrote in a letter to Roche:

> [W]e consider it unreasonable that we should be asked to agree to the findings of the Royal Commission when we have no idea what their findings will be or whether the same will be satisfactory to us. We cannot agree to a thing we know nothing about. We do not care to jump in the dark. We are anxious that no mistakes be made which may in future years bring trouble to us or to our children.

The Indians also contended that their progress would not be aided by adding to their reserves "second rate mountain pasture" or land without sufficient water to permit irrigation. As for Scott's condition that they be prepared to surrender any title the courts or the Privy Council might conclude they held, they expressed their willingness to do so, provided they were afforded the opportunity, which they claimed as their right, to choose the kind of treaty to which they would agree.[198]

The Nisga'a issued a statement on December 4, 1914, in which they too rejected the conditions proposed by Scott. They expressed concern that the promised appeal to the Privy Council might be construed as relating to the Canadian Privy Council rather than its imperial counterpart. They also sought assurance that, if the matter was first heard by a Canadian court, the Indians would be accorded the necessary standing and the province would be bound by the court's decision. Like the Indian Rights Association, they were wary of binding themselves in advance to the findings of the McKenna-McBride Commission without knowing what those findings would be, particularly when the Commission's terms of reference apparently limited it to allotting undisposed Crown lands and did not permit it to restore lands wrongly alienated by the province. In closing, the Nishga submitted the following proposal for consideration by Canada and other bands in British Columbia:

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[195] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Superintendent General of Indian Affairs, March 11, 1914.

[196] Order in Council PC 751, June 20, 1914, NA, RG 10, vol. 7780, file 27150-3-1, part 1.

[197] Indian Rights Association of British Columbia to W.J. Roche, Minister of the Interior, February 27, 1915, NA, RG 10, vol. 11047, file 33/General, part 6.

[198] Indian Rights Association of British Columbia to W.J. Roche, Minister of the Interior, February 27, 1915, NA, RG 10, vol. 11047, file 33/General, part 6.

> That when the findings of the Royal Commission are known, each Tribe that may consider such findings insufficient shall have opportunity of making application for additional lands to be reserved for the use and benefit of the Tribe for reasons to be stated in such application, and every such application which cannot be dealt with by conference between the Tribe and the two Governments shall be decided by His Majesty's Imperial Minister, the Secretary of State for the Colonies, in pursuance of the principal embodied in Article 13 of the "Terms of Union."[49]

Ultimately, Scott referred the Nishga proposals to the Department of Justice for its opinion, and, on April 26, 1915, Deputy Minister E.L. Newcombe replied:

> I am disposed to think that the agreement between the two Governments is intended to provide for the final delimitation of the reserves at the hands of the existing Commission, and that it would be inconsistent with the agreement to undertake for a review by the Colonial Secretary. Therefore, I think that the Government cannot be advised to agree to this unless with the consent of British Columbia. It may be observed, moreover, that by the 13th Article of the "Terms of Union" with British Columbia, it is only in case of disagreement between the two Governments respecting the area of tracts of land to be granted to the Indians that the matter is to be referred for the decision of the Secretary of State for the Colonies. That Article, therefore, does not contemplate an appeal as against the agreement of the two Governments.[50]

With that, the June 20, 1914, offer died on the table. As George Shankel comments, the conditions imposed by Scott were unacceptable to the Indians, and so, in effect, "the Province was fully satisfied and protected against any further claims and the Dominion Government saved with fair certainty from any possibility of a troublesome court case."[51]

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[49] W.E. [illegible], "Statement of the Nishga Nation or Tribe of Indians," December [illegible], 1914, NA, RG 10, vol. 7781, file 27150-3-3, reel C-12062 (ICC Exhibit 1b, tab 25); E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 145.

[50] E.L. Newcombe, Deputy Minister of Justice, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, April 26, 1915, NA, RG 7, series G21, vol. 521, file 2004, part 7(a), 1909-14 (ICC Exhibit 9, tab A).

[51] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 228.

The Royal Commission at Alkali Lake

In preparation for the Royal Commission's visit to the Williams Lake Agency, Commission Secretary J.G.H. Bergeron wrote to Indian Agent Isaac Ogden on December 19, 1913, to request that he compile and forward a list of the reserves in the agency and the means by which they could be reached by water, railway, or roads.[302] Ogden responded on January 27, 1914, providing in addition brief descriptions of the reserves and the manner in which contact could be made by telephone and telegraph.[303] He later prepared statistical returns for the agency setting forth population figures; cultivation acreages and production; extent of landholdings, improvements, and fencing; inventories of livestock and poultry; values of real and personal property; and sources and value of income.[304] In summarizing the desires of the Alkali Lake people on May 22, 1914, he stated:

> The Alkali Lake Indians wish to get land between their reserves, some of the reserves are close to each other, and what they wish is to have this land which is (Government) land joined to theirs and given to them.
>
> The population of the band is 198, mostly all their land is not much use.[305]

With this background information in hand, the McKenna-McBride Commission was finally ready to visit the Alkali Lake Band. By this point, Wetmore had retired and been replaced by White as chairman, with Saumarez Carmichael succeeding White as a federal appointee.[306] When the Commissioners convened the session on July 10, 1914, they were welcomed by Chief Samson who, in his introductory remarks, noted the Band's shortages of cultivated lands, hay meadows, and water for irrigation. Upon being sworn, the Chief testified regarding each of the Band's 14 existing reserves, noting that the Band was using all the good land it had at the time and that it had no room for expansion and growth. He added that the Band had about 350 horses and 100 cattle – down from the 561 horses and 123 cattle reported by Commissioner O'Reilly in 1881. To service this stock, band members had come to depend on Crown hay meadows – at that time, unsurveyed and unoccupied by white settlers – to supplement what they could produce on their reserves because the reserves were, in the words of researcher Patricia Berringer, "for the most part, marginal agricultural lands, incapable of supporting sustained yields or intensive use."[207] Chief Samson's evidence is summarized in Appendix C of this report.

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[302] J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs in British Columbia, to Isaac Ogden, Indian Agent, Williams Lake Agency, December 19, 1913, NA, RG 10, vol. 11020, file SRA/IO (ICC Documents, p. [illegible]).

[303] Isaac Ogden, Indian Agent, Williams Lake Agency, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs in British Columbia, December 19, 1914, NA, RG 10, vol. 11020, file SRA/IO (ICC Documents, pp. [illegible]).

[304] Agency Statistical Returns, Williams Lake Agency, March 31, 1914 (ICC Documents, pp. [illegible]).

[305] Isaac Ogden, Indian Agent, Williams Lake Agency, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs in British Columbia, May 22, 1914, NA, RG 10, vol. 11020, file SRA/IO (ICC Documents, p. [illegible]).

[306] *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria: Acme Press Limited, 1916), 19.

Following the Chief's testimony, the Commissioners examined 11 other members of the Band – Jimmy Decker, Tommy Johnson, Napoleon Bullem, August Martin, Charlie Spahan, Old Dick Johnson, Jimmy Spahan, David Dan, Billy Chelchel, Scolt, and Little Dick – regarding the locations of lands they used outside the reserves, the period during which they had used those lands, the purposes to which they put the lands, the quantity of livestock they owned, the quantity of hay they were able to cut on the lands, the presence of timber on the lands, the extent to which they had cleared, cultivated, irrigated, and erected improvements on the lands, and the area of additional reserve land for which they were applying. The Commissioners also received applications for additional land on behalf of four other band members who did not testify – Alex Kaleste, Bob Johnson, Louis Kaleste, and Antoine Spahan – and, on behalf of the Band as a whole, applications for large parcels of timber and pasture land that would also serve to link several of the Band's small disconnected holdings.[208] The 17 individual applications were numbered 9 through 24, with the Band's application for 3,992 acres of pasture land assigned number 24A. The land within application 24A eventually became IR 18, and Jimmy Decker's application 9 for 480 acres became IR 15. The combined applications of Old Dick Johnson (15), Tommy Johnson (17), David Dan (18), and Louis Kaleste (22), totalling 1,120 acres, became IR 17, and applications 10 (Alex Kaleste), 16 (Jimmy Spahan), and 23 (Antoine Spahan) became IR 16 (39 acres), 11A (131 acres), and 9A (250 acres), respectively.[209] The applications and the evidence of band members regarding them are summarized in Appendix D of this report.

At the close of the hearing, the Commissioners directed Indian Agent Ogden to meet with the applicants to obtain full descriptions of the desired lands for the purpose of better identifying them to the provincial authorities and determining whether the applications should be allowed. Three months later, on October 24, 1914, in preparation for his examination by the Commission, Ogden submitted a written report describing briefly each parcel applied for and recommending whether the applications should be allowed. With regard to each of the parcels comprising IR 15 and 17, he visited the lands and, finding them to be vacant, he recommended approval of the application. For some reason, however, his report addressed neither the application by Napoleon Bullem (application 12) nor the Band's applications for the pasture lands comprising IR 18 (application 24A) or the timber lands (application 24). As for the remaining applications, Ogden recommended that they all be approved, with the exception of an additional 80 acres adjoining August Martin's requested lands which he believed Martin did not require.[210] Ogden's comments are summarized in Appendix D of this report.

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[207] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, p. 93 (ICC Exhibit 3c).

[208] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, p. 59 (ICC Exhibit 3c).

[209] The acreages for IR 9A, 11A, and 16 reflect the areas following survey by D.M. MacKay in 1927.

Ogden met with the Royal Commission's assistant secretary, C.H. Gibbons, on November 17, 1914, to review the schedule of lands applied for by Indians in the Williams Lake Agency. They found that, because the Alkali Lake lands had not been sufficiently described to permit them to be precisely located and their legal status established, determining the status of the lands would have to wait until after their survey by the Royal Commission's technical officer, Ashdown Green.[211]

Six days later, Ogden appeared before the Commissioners in Victoria to testify regarding his meetings with the Alkali Lake applicants and his opinions on the Band's existing and proposed reserves. In addition, he provided general comments regarding the Band's circumstances:

> Q During the five years you have been Agent have these Indians decreased or increased?
> A They have increased.
> Q What is their condition?
> A They are pretty well to do Indians.
> Q What is their chief means of livelihood?
> A Stock raising and farming.
> Q Do you consider all this land [in the existing IR 1 through 14] as necessary for the use of the Indians of this Band?
> A I think some of this land they have no use for, but they ought to have other land that would be more suitable for them.

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[210] Isaac Ogden, Indian Agent, Williams Lake Agency, to Royal Commission on Indian Affairs for the Province of British Columbia, October 24, 1914, BCARS, vol. 11020, file 512D, reel B3638, Exhibit 8 (1), McKenna-McBride Commission (ICC Documents, pp. 524-25 and 527-29).

[211] C.H. Gibbons, Assistant Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, November 17, 1914 (ICC Documents, pp. 530-33).

Q. What land do you think they have no use for?

A. I can't tell you.

Q. Now the Alkali Lake Band — are they short of pasture?

A. They didn't say they were short.

Q. Does their pasture land balance up fairly well with their hay land, provided they cut all these meadow lands?

A. Yes, fairly well.

Mr. Commissioner McKenna: How many head of cattle are there in the Alkali Lake Band?

A. About one hundred head.

Mr. Commissioner Shaw: And they have seven or eight thousand acres of land besides what they are asking for in these new applications. Do they need any more pasturage?

A. A good deal of that land is pretty rocky and steep with high side hills.

Mr. Commissioner Carmichael: In the evidence, the Chief stated that half the men had no land on the Reserve. Is that correct?

A. Yes, the Chief means good land.

Mr. Commissioner McKenna: How are they off for pasture land?

A. They are fairly well off.

Q. Now do you consider that this request for additional pasture land is a reasonable one?

A. Yes.

Q. Why?

A. I thought they could raise more stock if they had a little more pasture land.

Q. Would they not have to increase their stock largely to avail themselves of the pasture land they have now?

A. Not very much.

Q. How many head of stock would the pasture land of the Alkali Lake Band Reserves adequately provide for now?

A. Not much more than they have now.

Q. Well they have 100 now — they have 100 now?

A. About 50 head more.

Q. It is pretty poor pasture land?

A. Yes.

Q. What would you consider from your knowledge of that country one head of stock would require. How many acres on the average, that is for the summer's run?

A. I cannot hardly say, but I think about 50 acres to one head.

Mr. Commissioner Shaw: If the Indians increase their band of cattle after they get these meadows they are asking for, will they have to stop the increase on account of pasture or shortage of winter feed?

A. They will be short of hay if they have to feed like they have to do. On the wagon road they would not have enough.

> Mr Commissioner McDowell: These Indians have 350 horses. Now supposing they reduce the horses by 300. How many cattle could they put on to replace the horses?
>
> A: Pretty nearly half of that number – 175.[71]

Ogden's comments regarding the Band's existing reserves and the lands for which it was applying are summarized in Appendices B and C, respectively, of this report.

In May 1915, Gibbons, who had replaced Bergeron as the Royal Commission's secretary, contacted Ogden and Inspector of Indian Agencies A. Megraw to obtain certain information that the Commission had requested Ogden to investigate and which, despite repeated requests, he had not yet furnished.[72] After learning that Ogden had been issued incorrect instructions, Gibbons asked that Ogden provide valuations of the Band's reserves, which he did on August 2, 1915, estimating the lands to be worth from $10 to $25 per acre.[73]

With all the Commission's transcripts and precis reports in hand at last, Gibbons was able to instruct Ashdown Green on August 14, 1915, to conduct his survey:

> It is the wish of the Commission that in defining, mapping and describing *the several parcels of land proposed to be allotted*, you exercise discretion and a certain latitude, not only in the matter of acreage but also as to the symmetrical arrangement of new reserves in relation to other contiguous lands and surveys made or of the future. *The greater number of the applications for this Agency you will note are for hay meadows which the Indian applicants have long been cutting* and while a specific acreage has, as a rule, been recommended by the Agent and taken cognizance of by the Commission, each acreage is to be regarded by you as in a measure elastic, *the Commission's intent being simply to meet the necessary and reasonable requirements of the Indians and the new allotments in their behalf to include only the meadows from which hay is cut, or which are otherwise utilized agriculturally.*

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[71] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, November 25, 1914 (ICC Documents, pp. 558 and 560-61).

[72] C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, to A. Megraw, Inspector of Indian Agencies, May 18, 1915, NA, RG 10, vol. 11020, file 512A (ICC Documents, p. 558); C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, to Isaac Ogden, Indian Agent, May 27, 1915, NA, RG 10, vol. 11020, file 512A (ICC Documents, p. 559).

[73] Isaac Ogden, Indian Agent, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, August 2, 1915, NA, RG 10, vol. 11020, file 512A (ICC Documents, pp. 564-66); Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861-1925," prepared for the Alkali Lake Band, October 18, 1992, pp. 61-62 (ICC Exhibit 8).

> For the convenience both of the Commission and yourself, and the systematizing of the work, the instructions of the Commission with respect to your work in the Williams Lake Agency, are hereunder summarized, the reference number in each instance being the item number in the Williams Lake Agency Additional Lands Application Schedule.
>
> ALKALI LAKE TRIBE
>
> Item No. 9 – Allowed, subject to Mr. Green's investigation, description and report.
> Item No. 10 – Ditto.
> Item No. 11 – Ditto.
> Item No. 12 – Not entertained, no action by Mr. Green necessary.
> Item No. 13 – Mr. Green to investigate and report.
> Item No. 14 – Allowed, subject to Mr. Green's investigation, description and report.
> Item No. 15 – Ditto.
> Item No. 16 – Allowed. Mr. Green, in company with the applicant Indian, to select suitable available land, of reasonably necessary area, describing and reporting in the usual manner.
> Item No. 17 – Allowed. Subject to Mr. Green's investigation, description and report.
> Item No. 18 – Ditto.
> Item No. 19 – Ditto.
> Item No. 20 – Allowed, subject to careful investigation by Mr. Green as to requisite area, he also to consult Minutes of Decision as to the allegation of the applicant Indian that land now applied for was granted as a reserve by Commissioner O'Reilly. Land being found available and not already constituted a reserve, Mr. Green to define and deal with in the usual manner.
> Item No. 21 – Allowed, subject to Mr. Green's investigation, description and report.
> Item No. 22 – Ditto.
> Item No. 23 – Ditto.
> Item No. 24 – Allowed approximately 20 acres, to meet timberland requirements of the applicant Indians. Mr. Green to select, define and deal with in the usual manner.[215]

The instructions made no mention of application 24A dealing with the lands comprising IR 18.

Within a month, Green had fulfilled his instructions in the Alkali Lake area, and he reported back to the Royal Commission on January 10, 1916:

> On the 16th September I arrived at Alkali Lake, where Mr. Wynn Johnson very kindly made me welcome.

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[215] C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, to Ashdown H. Green, BCLS, August 15, 1915, NA, RG 10, vol. 11020, file 512B (ICC Documents, pp. 557-60).

The following day I interviewed the Indians and made arrangements to visit their meadows.

No. 9 – Jimmy Decker's meadow contains about 80 acres, of which a large proportion is brush. About ten tons of hay is cut on this meadow and there is a good house, stable and implement shed. The greater part of this land is on Section 15, Township 43, Lillooet District.

No. 16 – is situated between Alkali Lake Reserve No. 11 and Lot 523, better known as the T.S. Meadow. It is a very poor place, but being contiguous to the reserve it is of more use to the Indians than to anyone else.

Nos. 15, 17, 18, 19 and 22 are on a tributary of Alkali Creek and can be embraced in one reserve. In the aggregate there are about 125 acres of swamp, the greater part of which is open grass land, in a few places hay cannot be cut every year on account of water but generally they are good meadows and a great assistance to the Indians, who are very short of feed for their stock.

No. 14 – Charley Spahan's meadows are on Sections 20 and 29, Township 74. They are about 20 acres in extent and are good meadows but rather wet.

No. 23 – Antoine Spahan's house and stable are on Section 14 and his meadows on Section 23, Township 76, Lillooet District. About 20 acres are swamp grass; the surrounding country is valueless being covered with black pine.

No. 10 – is on the right bank of the Fraser River opposite the mouth of Alkali Creek. Lot 974 is owned by Alexander Kaleste's father. The Indian houses, garden and a spring are on Lot 54, Crown Granted to Alex McEwen. The Indians have also fields on Lot 973 in which oats were sown last year. This lot has been Crown Granted to S.L. Laning. To the north of Lot 974 there is also an Indian field, which is vacant land, and could be given them.

No. 11 – is asked for by Bobby Johnson. There are two meadows; the western one is used by the owner of Lot 73; the eastern one is very wet and has not been cut this year if ever it was. Apart from the meadows the land is worthless.

No. 14 – applied for by Charley Spahan is situated on Sections 20 and 29, Township 74, Lillooet District. Like all the meadows in this part of the country it is liable to be flooded during the summer and autumn and cannot therefore be depended on. In dry seasons about 20 acres could be cut.

No. 20 – asked for by Scotty is on the N.E. 1/4 of Section 12, Township 45. It is part of the University Reserve. The Indians' statement that this place was reserved by Mr. O'Reilly is untrue. It may have been examined but was certainly never allotted.

No. 21 – Little Dick's meadow, is on Section 17, Township 43. It is a very worthless place, being rocky and full of sink holes; the ground is strongly alkaline and the grass very poor. I should not recommend that this place be allowed.

No. 23 – These meadows are about 20 acres in extent and may be enlarged by clearing the willow brush. Antoine Spahan's house and buildings are a quarter of a mile south of the meadows; he stated that the water in the swamp was bad and that he therefore had built his house close to a spring.

This place adjoins Reserve No. 9 on its eastern boundary and is on Sections 14 and 23, Township 76, Lillooet District.

No. 24 – In my instructions I am directed to examine and define 20 acres to meet the timber requirements of these Indians. I had several conversations with the Indians

> about their timber and they were very anxious that I should examine and sketch the whole of the lands connecting their reserves which would embrace about 80 square miles. If they really want firewood, which I doubt, a strip of ten chains to the south of Reserve No. 1 would be ample and they could also cut a few sawlogs on it. But it is timber land they ask for, and in this country the timber generally is black pine and the fir is small and scattered so that a large area would be required. At present they cut on Government land moving their mill when they have exhausted the country. I suggested that they had better apply for a timber limit or get a hand loggers license but this did not seem to meet their views [as] there would be money to pay out.
>
> With regard to Reserve No. 7 on Lac la Hache, if Mr. Ogden will read the Schedule he will see that the graveyard is on Lot 519, Group 1, this Lot is 1 1/2 miles southwest of Alkali Lake and the graveyard is one chain from the right bank of Alkali Lake Creek as shown on the plan of the Alkali Lake Indian Reserves. The schedule is badly worded.
>
> In looking over the plan of Reserve No. 7 I notice an error in the acreage both on the plan and in the Schedule. The correct area is 7 acres.
>
> In accordance with your instructions I ascertained from Mr. Agent Ogden that he had not secured water record for Reserves Nos. 12, 13 and 14, as there was no water available, the supply being too limited.[216]

On February 26, 1916, the Commission issued its first order with regard to the "Alkali Lake Tribe," confirming all 14 of the Band's existing reserves.[217] Within 48 hours, however, the Commission reconsidered its earlier order and directed that the 1,250-acre IR 6 known as Wycott's Flat be cut off.[218]

With regard to the additional lands sought by the Band, Gibbons on May 18, 1916, forwarded tabulations of the Additional Lands Applications for the Williams Lake Agency to R.A. Renwick, British Columbia's Deputy Minister of Lands, with a request for final clearances so that the lands could be formally allotted.[219] Two days later, the Commission issued orders allowing both IR 15 and 17, as well as applications 10 (40 acres), 16 (110 acres), and 23 (180 acres),[220] followed in a week by yet another order allowing

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[216] Ashdown H. Green, BCLS, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, January 10, 1916, NA, RG 10, vol. 11004, file 33/16, part 2 (ICC Exhibit 1E, tab 3).

[217] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," February 26, 1916 (ICC Documents, p. 367).

[218] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," February 28, 1916 (ICC Documents, pp. 367-68).

[219] C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, to R.A. Renwick, Deputy Minister of Lands, May 18, 1916, NA, RG 10, vol. 11020, file 512B (ICC Documents, p. 364).

[220] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," May 20, 1916 (ICC Documents, pp. 368-69). As noted in footnote 208, the areas of IR 9A (application 23), 11A (application 16), and 16 (application 10) became 250 acres, 151 acres, and 50 acres, respectively, following survey by D.M. MacKay in 1927.

IR 18.[221] Applications 11 and 24 were rejected as being "not reasonably required" while applications 12, 13, 19, and 20 were not entertained because the lands being applied for had already been alienated and were not available to be reserved; the Commissioners refused to allot the lands in application 14 because the land constituted "intermittent small meadows." Application 21 was rejected outright without reasons.[222] When it later released its orders in consolidated form, the Commission proclaimed that,

> [i]n virtue of powers and instructions from the Governments of the Dominion of Canada and the Province of British Columbia contained in Commissions issued under the Great Seal of Canada ... to us directed, *authorizing and empowering us as a Commission to fix, determine and establish the number, extent and locality of the Reserves to be set aside, allotted, established and constituted for the use and benefit of the Indians* of the Province of British Columbia, *we*, the undersigned, having in each case made due enquiry into all matters affecting the requirements of the said Indians, *do hereby declare the following to be the Reserves for the under-mentioned Indian Tribes respectively.*[223]

Other than confirming with the provincial Department of Lands that all the lands being applied for were vacant and available to be reserved, the Royal Commission's work in the Alkali Lake area was done. The net effect of its recommendations would have increased the Band's holdings by 4,685.02 acres to 13,032.52 acres; the 8,347.5 acres allotted by O'Reilly were increased by 5,922 acres but reduced by 1,230 acres (IR 6) and 6.98 acres (the adjustment to the fishery and graveyard in IR 7).

The Royal Commission's Final Report and the Emergence of the Allied Tribes

Following the Nishga Tribe's rejection on December 4, 1914, of Deputy Superintendent General Scott's conditional offer of June 20, 1914, to submit the question of aboriginal title to Canada's Exchequer Court, a number of Indian bands and groups met at Spence's Bridge on February 15, 1915, in support of the Nishga petition. "by this time the test case and cause célèbre among the Indians of the Province."[24] In earlier years the driving force behind various Indian movements had been white, and indeed individuals such as ethnographer James Teit and lawyer Arthur O'Meara still had significant roles to play. But from this point the leadership increasingly fell to Indians such as Peter R. Kelly, a Haida from Skidegate who had been ordained as a Methodist minister, and Andrew Paull, a "well-educated ... young man of Squamish descent."[25]

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[221] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," May 27, 1916 (ICC Documents, pp. 369-70).

[222] Williams Lake Agency, Additional Lands Applications, in Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," May 30, 1916 (ICC Documents, pp. 372-74 and 372-75).

[223] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," May 31, 1916 (ICC Documents, p. 366). Emphasis added.

O'Meara and Nishga Chief W.J. Lincoln spent six weeks in Ottawa in the spring of 1915 to press the case for aboriginal title with Scott and Superintendent General Roche. Scott rejected O'Meara's proposal that the issue of provincial alienation of Indian lands be adjudicated by the Colonial Secretary, with compensation if awarded to be paid by Canada. Instead, he recommended that the Indians take their claims before the Royal Commission, which would not prejudice their aboriginal title claim and represented their "only hope." However, when the Indians appeared before the Commission in October 1915, they were advised that it had no power to deal with lands already disposed of by the provincial government.

The general dissatisfaction of Indians with the role and functioning of the Commission led to alienation from both levels of government and the creation in 1916 of a new organization – the Allied Tribes of British Columbia – to give voice to their concerns. "At one of its first meetings in June 1916, the Allied Tribes denounced the work of the royal commission, [and] demanded reserves of 160 acres per capita, recognition of aboriginal title, and compensation for lands already alienated."[26] O'Meara became the organization's legal counsel and pressed to have the report of the Royal Commission withheld until the issue of aboriginal title could be heard by the Judicial Committee of the Privy Council.[27] The Allied Tribes expressly rejected Scott's conditional proposal set forth in the Order in Council of June 20, 1914, to have the question of aboriginal title heard by the

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[24] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 98.

[25] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 95; Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 131–32.

[26] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 144; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, pp. 201–02.

[27] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 232.

Exchequer Court.[228] Ironically, because the McKenna-McBride Agreement "had set aside the whole matter of aboriginal title" to focus entirely on the issues of size and location of reserve lands, and "though the Commissioners did a very thorough piece of work and attempted to be liberal," the Indians, instead of being placated, "were spurred on to greater efforts."[229]

On May 29, 1916, with the release of the Royal Commission's final report looming, O'Meara made one last appeal to the Governor General, the Duke of Connaught, to delay the report pending a hearing before the Privy Council. But it was not enough. The report was released, although not to the public, in June 1916, three months before E.S. Stanton, the Governor General's secretary, replied to O'Meara that "His Royal Highness ... considers it is the duty of the Nishga Tribe of Indians to await the decision of the Commission, after which, if they do not agree to the conditions set forth by that Commission, they can appeal to the Privy Council in England, when their case will have every consideration."[230]

For the province as a whole, the work of the Commissioners is graphically summarized in Table 1.[231]

TABLE 1

Reserves Confirmed, Cut off, and Added
(by area and value)

Reserves	***Acreage***	***Value***
Confirmed	666,640.25	$19,890,000
Cut off	47,058.49	$ 1,522,704
Added	87,291.17	$ 444,838

In short, while the area of the lands added to the province's Indian reserves was almost *double* the lands cut off, the value of the cut-offs was more than

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[228] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 204.

[229] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 240; Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 130.

[230] E.S. Stanton, Governor General's Secretary, to Arthur E. O'Meara, September 25, 1916, NA, RG 10, vol. 11047, file 33/General, part 6. This assurance given on behalf of the Duke of Connaught formed the fourth touchstone on which the Indians relied to base their claim to have the aboriginal title issue heard before the Privy Council.

[231] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 141; George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 229.

triple the value of the new reserve lands.[232] James Teit later summarized the Allied Tribes' view of the Commission's work in these terms:

> The Indians see nothing of real value for them in the work of the Royal Commission. Their crying needs have not been met. The Commissioners did not fix up their hunting rights, fishing rights, water rights, and land rights, nor did they deal with the matter of reserves in a satisfactory manner. Their dealing with reserves has been a kind of manipulation to suit the whites, and not the Indians. All they have done is to recommend that about 47,000 acres of generally speaking good lands be taken from the Indians, and about 80,000 acres of generally speaking poor lands, be given in their place. A lot of the land recommended to be taken from the reserves has been coveted by whites for a number of years. Most of the 80,000 acres additional lands is to be provided by the Province, but it seems that the Indians are really paying for these lands. Fifty percent of the value of the 47,000 acres to be taken from the Indians is to go to the Province, and it seems this amount will come to more than the value of the land the Province is to give the Indians. The Province loses nothing, the Dominion loses nothing, and the Indians are the losers. They get fifty percent on the 47,000 acres, but, as the 47,000 acres is much more valuable land than the 80,000 they are actually losers by the work of the Commission.[233]

With specific reference to the Indians of Alkali Lake, the Commission cut off the 1,230-acre IR 6, valued by Indian Agent Ogden at $30,750 ($25 per acre),[234] but added new reserves totalling 5,922 acres which, if similar to the mid-range values of the Band's other reserves at $15 to $20 per acre, would have been worth from $88,830 to $118,440.

In the months following the completion of the report, Scott hoped to "settle the reserve question" and "blunt the impact of the rising [Indian] agitation" by securing the agreement of the federal and provincial governments to the report before it was released to the public.[235] As he wrote to Senator Hewitt Bostock on February 7, 1917:

> It appears to me on the whole that it would be advisable for the Province and for this Government on behalf of the Indians to accept the report. If it were to be released

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[232] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 141.

[233] Statement by James Teit, spring 1920, in *Appendix to the Journals of the Senate of Canada, 1926-27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), 125.

[234] Isaac Ogden, Indian Agent, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, August 2, 1915, NA, RG 10, vol. 11020, file 512A (ICC Documents, pp. 554-560).

[235] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 144.

> before acceptance and became the subject of examination and criticism by the Indians there could be no quiet settlement of the question, as I have formed the opinion that the Indians would hardly be satisfied with any reasonable arrangement for reserves. As you know they claim they should have large tracts of land and special privileges of hunting and fishing. I think that as they had full and free opportunity of making representations to the Commissioners, they should not have a second opportunity of criticizing an unconfirmed report....
>
> I think it is advisable that the Province and the Dominion should come to a reasonably speedy and harmonious decision on the Commission's report, otherwise the question would have to be referred to the Secretary of State for the Colonies under the provisions of Clause 13 of the Terms of Union. I have the conviction that if the reserve question is disposed of, we will be able to get the Indians to consent to a reference to the courts under the agreement offered them by this Government.[256]

This time, politics at the provincial level intervened when the Conservative party under McBride's successor, W.J. Bowser, was defeated in the fall of 1916. The new provincial Liberal government did not meet with federal officials until 1917, when Premier H.C. Brewster indicated that "he had received complaints about the additions to reserves."[257] In the House of Commons, Superintendent General Roche was asked to describe the steps taken to settle the Indian "difficulty" in British Columbia:

> The question involved is really that of the title to Indian lands in British Columbia. There has been a dispute for many years between the British Columbia Government and the Indians as to the Indian title; in fact, I understand, some of the Indians go so far as to claim the whole of the land of British Columbia – that is, they say that their title has never been extinguished. It was because of these difficulties that my predecessor in the Superintendent Generalship appointed a committee to investigate the reserves in British Columbia. *In 1913, an Order in Council was passed providing that if the Indians would abide by the decision of an impartial tribunal as to reserves, the full question of the Indian title would be submitted to the Privy Council, through the ordinary course.* This impartial tribunal was to ascertain, with regard to each band of Indians in the province, whether the area of its reserve was large enough for the band or not. In case the reserve was found to be too small, the British Columbia Government promised to increase its area by the addition of provincial lands; and if the reserve was found to be larger than necessary for the band, the area was to be cut down accordingly. For many years the Indians have been trying to get an appeal to the Privy Council, but the British Columbia Government did not

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[256] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Senator Hewitt Bostock, February 7, 1917, NA, RG 10, vol. 3822, file 59335-1, vol. 4, reel C-10144 (ICC Exhibit 11, tab 1).

[257] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861–1925," prepared for the Alkali Lake Band, October 15, 1992, 71 (ICC Exhibit 3c); E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 144.

> approve of having the case submitted in that way. Neither our predecessors in Government nor ourselves were able, for a time, to bring the British Columbia Government to agree to submit the case. We pledged ourselves, if the terms of the Order in Council were carried out, to have a reference to the Privy Council, and the British Columbia Government consented to the same. The findings in regard to the reserves have been made, and are to be approved by the British Columbia Government and the Dominion Government. Of course, Mr. O'Meara, counsel for some of the Indians, takes the position that these findings should be submitted to the Indians for their consideration before they are submitted to either Government. I think that this is a fair statement of the dispute with the Indians who Mr. O'Meara is representing. There are many Indians in British Columbia who are willing to adhere to the terms of the Order in Council and to abide by the findings of the commission, and to have the appeal as to the title of the land carried through the ordinary course.[238]

In response to a follow-up question of whether the matter was near settlement, Roche replied, "Not so far as the Privy Council is concerned."[239] In making these statements, it seems evident that he was referring to the Order in Council of June 20, *1914 – not* 1913 – containing the offer proposed by Scott.

John Oliver became premier of British Columbia following Brewster's death in March 1918. On March 20, 1918, Scott wrote to Oliver "urging immediate action on the report of the royal commission," and the premier travelled to Ottawa to meet with Scott and Superintendent General Arthur Meighen. The meeting proved fruitless, however, as Oliver, "under the impression that the issue was far more complex than Ottawa supposed and that vital provincial rights were at stake," wanted to "examine the matter carefully and make no hasty decisions."[240]

In succeeding months, Oliver's Minister of Lands, T. Duff Patullo, became the province's lead negotiator in resolving the work of the Commission with Scott. He became concerned when he learned that, before reserves could be reduced as contemplated by clause 2(a) of the McKenna-McBride Agreement, the Indians would have to provide their consent in accordance with the surrender provisions of the *Indian Act*. The provincial government had also received feedback from residents "regarding the retarding effect that Indian reserves were having on settlement and development."[241] Rumours swirled that the Royal Commission's report recommended reductions of various reserves to free up lands for returning soldiers and would soon be adopted by orders in council of the two governments; in anticipation of the report's release, the Allied Tribes issued another statement urging Canada to refrain from acting until the Judicial Committee of the Privy Council had determined the Indians' land rights.[242] In the opinion of Professor Brian Titley, the province considered this situation to be risky:

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[238] Canada, House of Commons, *Debates*, June 14, 1917, 2340. Emphasis added.

[239] Canada, House of Commons, *Debates*, June 14, 1917, 2340.

[240] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 145.

[241] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 145–46.

> A secret agreement with Ottawa to endorse the report of the commission might result in an outcry from constituents and create further difficulties for a regime with enough troubles on its shoulders. During the early months of 1919, Patullo distributed maps to members of legislature showing how reserve lands in their constituencies were affected by the report. And on 4 March the provincial government abandoned any further pretence at confidentiality and released the report to the public. Victoria was giving notice that there would be no secret agreement and that certain aspects of the report would be open to re-negotiation.[243]

REVIEW BY DITCHBURN AND CLARK

Events Preceding the Review

On March 29, 1919, British Columbia passed the *Indian Affairs Settlement Act*, designed to empower the provincial government "'to give effect' to the report of the royal commission and to negotiate with the federal government or with the Indians to settle outstanding differences."[244] The legislation stated:

> 2. To the full extent to which the Lieutenant-Governor in Council may consider it reasonable and expedient, the Lieutenant-Governor in Council may do, execute, and fulfil every act, deed, matter, or thing necessary for the carrying out of the said [McKenna-McBride] Agreement between the Governments of the Dominion and the Province according to its true intent, and for giving effect to the report of the said Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.
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> 3. Without limiting the general powers by this Act conferred, the Lieutenant-Governor in Council may, for the purpose of adjusting, readjusting, or con-

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[242] "Statement of the Committee of the Allied Tribes of British Columbia for the Government of Canada," February 5, 1919, NA, RG 10, vol. 11047, file 33/General, part 6; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 150.

[243] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 146.

[244] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 147.

> firming the reductions, cut-offs, and additions in respect of Indian reserves proposed in the said report of the Commission, carry on such further negotiations and enter into such further agreements, whether with the Dominion Government or with the Indians, as may be found necessary for a full and final adjustment of the differences between the said Governments."[265]

With a view to initiating discussions, British Columbia asked the Allied Tribes for a statement explaining that organization's refusal to accept the report of the Royal Commission and outlining the conditions it considered necessary for an equitable settlement. In a lengthy response in the form of a pamphlet dated November 12, 1919, drafted by Peter Kelly and James Teit, the Allied Tribes objected to the report on several grounds:

- the question of aboriginal title should have been resolved, either by agreement of the two governments or by reference to the Privy Council, before "subsidiary matters" such as the findings of the Royal Commission were considered;
- the additional lands, being largely of inferior quality and considerably less value than the lands cut off, were "utterly inadequate for meeting the present and future requirements of the Tribes";
- the Royal Commission had predicated its work on the incorrect assumption that Article 13 of the *Terms of Union* set forth all obligations of the two governments to the Indians of the province, while ignoring the Indians' land rights and the power conferred by Article 13 on the Secretary of State for the Colonies to resolve disagreements between the governments regarding the quantities of land to be set apart for the Indians;
- the provincial government had recovered two million acres of land from white farmers in 1916 for default in payment but had not made this land available to the Indians;
- the Commissioners had failed to adjust the inequalities between bands in terms of area and value of reserve lands or to adjust water rights; and
- the proceeds of sale of lands cut off by the Commission were to be divided, one half going to the province, which was objectionable in itself, and the

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265 *Indian Affairs Settlement Act*, SBC 1919, c. 32.

other half going to the federal government, not for the benefit of the band losing the lands but for the benefit of all the Indians of the province.[246]

Contending that Indians in surrounding provinces and states had been much better treated in the allocation of reserve lands, the Allied Tribes set forth a list of 20 items that it considered "necessary conditions of equitable settlement." Among other things, the list included:

- acceptance by the two governments that the *Royal Proclamation of 1763* and Minister of Justice Télesphore Fournier's statement of 1875 would form the main basis of all dealings;
- agreement that each band would acquire "a full, permanent and beneficial title to the land" set aside for it;
- the allocation of 160 acres of "average agricultural land" for each individual, with a supply of water sufficient for irrigation for lands in dry areas;
- the adjustment of existing inequalities in acreage and value of reserve lands, with provision for the acquisition of land by compulsory purchase on the bands' behalf to enable the acquisition of sufficient lands to permit the adjustment of these inequalities;
- reference of disagreements among the two governments and the Allied Tribes to the Secretary of State for the Colonies; and
- compensation for inequalities of acreage, quality, or value of reserved lands, for lands reserved in locations other than agreed to by the bands, for damage to the timber and natural resources on reserved lands, and for moneys spent pursuing the claim.[247]

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[246] Statement of the Allied Indian Tribes of British Columbia for the Government of British Columbia, November 12, 1919, NA, RG 10, vol. 11047, file 33/General, part 6; Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 98–99; Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 134; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 150.

[247] Statement of the Allied Indian Tribes of British Columbia for the Government of British Columbia, November 12, 1919, NA, RG 10, vol. 11047, file 33/General, part 6; Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 98–99; Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 134; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 150.

In closing, the statement indicated the willingness of the Allied Tribes to accept a truly equitable settlement of its claim, but not a "mere compromise," and it pledged to pursue its case in the Privy Council until it obtained judgment or an earlier settlement. The Allied Tribes also acknowledged that it might not be representative of all bands on all issues and that specific negotiations might be required with individual bands.[248]

At about the same time, after the Oliver government had refused for close to two years to take a position on the Indian question, Patullo agreed to meet in Ottawa with Meighen and Scott. He signalled British Columbia's willingness to accept the report of the Royal Commission, but only subject to a number of conditions:

1. The federal government should secure the consent of the Indians to cut-offs.
2. The following additions should not be made: Andimal, Decker Lake, Burns Lake, Anaham Lake, Marysville, Creston.
3. If additions are not occupied by the Indians, they should be sold at public auction.
4. Should any reserve to which additions are made not contain the acreage estimated by the Commission, the province would not be obliged to provide extra land; should any such reserve be larger than the estimated acreage, it should be reduced to the estimation.
5. Indians should have the same water rights as non-Indians.

It will be noted that Patullo at this time made no mention in item 2 of refusing the proposed additions to the Alkali Lake reserves.

When Ottawa refused to accede to these conditions, as being "foreign to the spirit of the original agreement," Patullo angrily withdrew his offer. Meighen was unfazed by Patullo's reaction, since he considered the province's negotiating position as "manifestly intended to be fruitless" and "impossible of consideration by this Department."[250]

Despite their heated exchanges, Meighen and Patullo "were eager for a mutually acceptable settlement." Canada commenced drafting legislation to parallel British Columbia's *Indian Affairs Settlement Act*, and Meighen informed Patullo of his hope that Bill 13 "would lead to renewed negotiations."[251] Bill 13 stated:

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[248] "Statement of the Allied Indian Tribes of British Columbia for the Government of British Columbia," November 12, 1919, NA, RG 10, vol. 11047, file 33/General, part 6.

[249] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 146.

[250] Arthur Meighen, Superintendent General of Indian Affairs, to T.D. Patullo, Minister of Lands, December 1, 1919, NA, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, pp. 577-82); E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 147.

> 2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfill every act, deed, matter or thing necessary for the carrying out of the said Agreement between the Governments of the Dominion of Canada and the Province of British Columbia according to its true intent, and for giving effect to the report of the said Royal Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.
>
> 3. For the purpose of adjusting, readjusting or confirming the reductions or cut-offs from reserves in accordance with the recommendations of the Royal Commission, *the Governor in Council may order such reductions or cutoffs to be effected without surrenders of the same by the Indians, notwithstanding any provisions of the Indian Act to the contrary*, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments.[252]

The key words of this draft legislation, shown in italics, provided that, notwithstanding anything to the contrary in the *Indian Act*, reductions or cut-offs could be made *without surrenders* by the Indians. This wording represented an obvious departure from clause 2(a) of the McKenna-McBride Agreement which had stated that, "[a]t such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, *with the consent of the Indians, as required by the Indian Act*, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians." The provision also reneged on promises made by members of the Royal Commission that reserve lands would not be taken without the Indians' consent.[253]

For his part, Patullo solicited the opinion of J.W. Clark, the Superintendent of BC Soldier Settlement in the Department of Lands, regarding the report of the Royal Commission. In his reply of April 21, 1920, Clark was anything but complimentary:

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[251] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 147.

[252] *British Columbia Indian Lands Settlement Act*, SC 1920, c. 51. Emphasis added.

[253] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 147.

> Your attention is respectfully drawn to the great inequalities of the per capita acreage between the various bands in the majority of the Agencies; To the findings of the Royal Commission which in many cases increases rather than diminishes the said inequalities; To the valuations which in many cases are unreasonably high; To the large amount of errata in the clerical work of the report....
>
> The results show that the Royal Commission either ignored the per capita acreage of the Bands as a basis for their work or failed miserably in their mission as set forth by the Dominion and Provincial Governments. Indeed the results mentioned above, the perusal of the volumes of type-written evidence, and a large amount of errata in the Report, convinces one that the latter deduction is correct.[254]

Remarkably, Clark lamented that, if only the Royal Commission had "followed the policy of Sir James Douglas which in 1859 was in accord with the wishes of the Imperial Government as expressed by Lord Carnarvon, the then Secretary of State for the Colonies, and which called for treatment of the Indians with justice and forbearance, rigidly protecting their civil and agrarian rights, locating them in native villages for their protection and civilization, and exercising due care to avoid checking, at a future date, the progress of the white Colonists, we should not now be witnessing the present unsatisfactory state of affairs." He expressed concern that the widely scattered additions to reserves proposed by the Commission would make it harder to "uplift" the Indians through education, industry, and training than if they had been concentrated on centralized reserves, and he proposed expenditures on expropriation of lands adjoining reserves to permit such centralization to take place. To this end, he recommended the creation of a standing joint commission "with expropriation and other necessary powers on behalf of the Indians and for the progress of the white settlers in the localities concerned."[255]

The day after receiving Clark's report, Patullo wrote to Meighen with a proposal:

> When I was in Ottawa last Fall, I suggested to the Deputy Superintendent General that I thought it would be a good idea to have an officer of your Department appointed to co-operate with an officer of this Department to carefully review the whole Report of the Indian Commission.
>
> I am more convinced than ever that this is the best and most prudent course to pursue. There are innumerable errors in the Report, and, apart from this phase of the

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[254] J.W. Clark, Superintendent of B.C. Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920, NA, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, pp. 383-85).

[255] J.W. Clark, Superintendent of B.C. Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920, NA, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, pp. 383-85); ICC, *Inquiry into the Claim of the Nak'azdli First Nation* (Ottawa, March 1996), reported (1998) 7 ICCP 81 at 94-95.

> matter, as I pointed out when in Ottawa, a large number of additions have been recommended by the Commission which it would seem beyond doubt were selected for their strategic or controlling location and not that they will actually be required by the Indians for settlement purposes.
>
> I take it that the spirit of the agreement between the two Governments is that the Indians shall be provided with ample lands to meet their legitimate requirements, but I do not think that it is the spirit of the agreement that lands should be set aside for their future speculative value and in a manner which is likely very much to retard white settlement.
>
> Under all the circumstances, I very strongly suggest that you should appoint an officer of your Department to proceed to British Columbia for the purpose of carefully reviewing, with an officer of this Department, the work of the Commission....
>
> There is no doubt, however, that the report requires modification in a number of particulars, and your own officer, in co-operation with an officer of this Department, will, I am sure, obtain first hand knowledge of the situation that will materially assist in arriving at a speedy and equitable solution.[256]

On May 27, 1920, Meighen replied that, as soon as Bill 13 had become law, he would be in a position to consider Patullo's proposal, which he looked upon favourably:

> We would undertake this critical examination of the Royal Commission's report with the hope of coming to an amicable conclusion under the terms of the McKenna-McBride Agreement and would generally follow the suggestions of the Commission unless they are found by either party to be susceptible to useful changes.[257]

During the course of the debate over Bill 13 in the Senate on June 2, 1920, Senator Bostock raised the concern that, if the bill became law, the Indians might "be entirely put out of Court and be unable to proceed on any question of title." However, Sir James Lougheed, leader of the government in the Senate, assured Bostock that his fears were ungrounded:

> I might say further, honourable gentlemen, that we do not propose to exclude the claims of Indians. It will be manifest to every honourable gentleman that if the Indians have claims anterior to Confederation or anterior to the creation of the two Crown Colonies in the Province of British Columbia they could be adjusted or settled by the Imperial Authorities. Those claims are still valid. If the claim be a valid one which is being advanced by this gentleman and those associated with him as to the Indian

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[256] T.D. Patullo, Minister of Lands, to Arthur Meighen, Superintendent General of Indian Affairs, April 21, 1920, NA, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, pp. 588–91).

[257] Arthur Meighen, Superintendent General of Indian Affairs, to T.D. Patullo, Minister of Lands, May 27, 1920, NA, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, p. 592).

> Tribes of British Columbia being entitled to the whole of the lands in British Columbia this Government cannot disturb that claim. That claim can still be asserted in the future.[258]

The following week, on June 9, 1920, James Teit prepared a petition on behalf of the Allied Tribes for the Senate to request that the federal government refrain from passing Bill 13. Over the protests of the Allied Tribes, however, the bill received royal assent on July 1, 1920, and became the *British Columbia Indian Lands Settlement Act*. Enacted hand in hand with Bill 14, which permitted the Department of Indian Affairs to enfranchise Indians without their consent, the passing of this legislation marked, in the words of the Friends of the Indians of British Columbia, "the climax of all injustice from which the Indian Tribes of the Province have suffered for the past fifty years."[259]

Work of Ditchburn and Clark

During September 1920, Deputy Superintendent General Scott, while vacationing in British Columbia, met with Patullo to arrange for the review of the work of the McKenna-McBride Commission contemplated by the *Indian Affairs Settlement Act* and the *British Columbia Indian Lands Settlement Act*. The meeting was apparently "amicable" and the two were able to establish a mutually satisfactory process, subject to the appointment of appropriate representatives for the two governments and the Allied Tribes.[260]

The following month, W.E. Ditchburn, Canada's Chief Inspector of Indian Agencies in British Columbia, was appointed as Canada's representative. On October 20, 1920, he advised Patullo of his appointment and asked for the name of the province's representative "in order that I may confer with him, as it would appear to be essential for both Governments that the work should be proceeded with at an early date, and completed as soon as possible."[261] Within five days, Ditchburn had his reply: he would be joined by the author of the scathing review of the report of the Royal Commission, J.W. Clark, who was by then the superintendent of the Immigration Branch in Patullo's Department of Lands.[202] The Society of Friends of the Indians of British Columbia was delighted to learn that, "the two Governments [having] conceded that the findings of the Royal Commission do not do full justice to the Indian Tribes in the matter of lands, and [having] decided to appoint a Board of Investigation." Teit would be a consulting member in the review.[203]

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[258] Canada, Senate, *Debates*, June 2, 1920, 475-76, in *Appendix to the Journals of the Senate of Canada, 1926-27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), xiv and xv.

[259] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 104-06; Society of Friends of the Indians of British Columbia, "Causes which Rendered Society's Work Necessary," November 5, 1920, NA, RG 10, vol. 11047, file 33/General, part 6.

[260] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 148.

[261] W.E. Ditchburn, Chief Inspector of Indian Agencies, to T.D. Patullo, Minister of Lands, October 20, 1920 (ICC Documents, p. 595).

After less than one month on the job, Ditchburn submitted the following report on November 16, 1920:

> I beg to say that we are getting ahead with the work very nicely and so far no hitch has occurred. Major Clarke is representing the Provincial Government and I have found him up to the present quite sympathetic to the Indians as regards their requirements.
>
> As the Measures passed by both the Dominion and Provincial Governments only meditate negotiations taking place with regard to reductions, cut offs and additional reserves, it will be necessary for you to give me authority to have surrenders submitted to Indians in cases ... where confirmed reserves are to be exchanged. This, I consider, is best, for otherwise it might open up the question pertaining to all the reserves which have been confirmed. Agent McAllan has been very fair and in some cases has proposed disallowance of some new reserves recommended by the Commission. This should have the effect of showing the Provincial authorities that we are desirous of acting fairly and are only asking for what we deem to be reasonably necessary for the Indians.
>
> In the Coast agencies I do not consider it necessary to have Mr. Teit come to Victoria and I am therefore anxious that he should spend as much time as possible in the Interior sections, such as the Kamloops, Kootenay, Lytton, Okanagan and the Williams Lake agencies, as well as in the Skeena River and Nass River agencies, as the more serious phases of the reserve question will be found when dealing with the requirements for the Indians in these portions of the Province.[204]

In reply to Ditchburn's request for authority to submit surrenders to the Indians, Scott replied on December 3, 1920, that he and the Superintendent General had concluded that "it would be better for you to report and receive specific instructions in each case."[205]

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[202] F.W. Clark, Superintendent, Immigration Branch, to W.E. Ditchburn, Chief Inspector of Indian Agencies, October 28, 1920 (ICC Documents, p. 506).

[203] Society of Friends of the Indians of British Columbia, "Causes which Rendered Society's Work Necessary," November 8, 1920, NA, RG 10, vol. 11047, file 33/General, part 6.

[204] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, November 16, 1920, NA, RG 10, vol. 11047, file 33/General, part 6.

[205] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.E. Ditchburn, Chief Inspector of Indian Agencies, December 3, 1920, NA, RG 10, vol. 7781, file 27150-3-15, part 1 (ICC Documents, p. 507).

At Ditchburn's suggestion, Teit provided Scott with information on December 13, 1920, regarding a meeting of the Executive Council of the Allied Tribes. The organization had decided that, while it would maintain its protests against Bills 13 and 14, it would also keep good faith with the two governments by avoiding "action of any kind which would in any way interfere with the work of the [Ditchburn-Clark] Board of Investigation and the attainment of a settlement with the Governments through the work of this Board."[266]

Ditchburn, Clark, and Teit continued their work during 1921 while concern developed that the locations of reserves in the province had not yet been finally decided. In early January 1922, private surveyor R.W. Haggen approached Scott with a view to determining whether he might be of assistance in setting apart the reserves:

> At the present time there is considerable land being taken up, in the districts mentioned, by new settlers, and no little inconvenience is being occasioned by the lack of information as to the approved Indian holdings.
>
> It would not be very expensive to have these allotments surveyed, and I would suggest that, as their standing has now been in the indefinite stage for six years, it is about time they were definitely established, and the survey of them would be a great convenience to the Indians, Departmental Officials and general public.[267]

Scott thanked Haggen for his offer but informed him that nothing yet had been decided.[268]

In the same month the Allied Tribes met in North Vancouver where it "expanded into a larger and more representative organization."[269] It pledged to continue the case before the Privy Council and to press Canada to identify a court of first instance before which the proceedings could commence.[270] Teit attended and was named general secretary and treasurer, but he was already ill with cancer and within a few months would be incapable of continuing his work with Ditchburn and Clark. As Ditchburn reported to Scott on

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[266] J.A. Teit to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, December 13, 1920, NA, RG 10, vol. 3823, file 59335-5.

[267] R.W. Haggen, Dominion and BC Land Surveyor, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, January 10, 1922, NA, RG 10, vol. 7790, file 27160, part 1 (ICC Documents, p. 598).

[268] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to R.W. Haggen, Dominion and BC Land Surveyor, January 23, 1922, NA, RG 10, vol. 7790, file 27160, part 1 (ICC Documents, p. 599).

[269] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 151.

[270] P.R. Kelly, Chairman, J.A. Teit, General Secretary and Treasurer, and Andrew Paull, Recording and Corresponding Secretary, Allied Tribes of British Columbia, "Circular Letter to the Tribes," January 20, 1922, NA, RG 10, vol. 11047, file 33/General, part 6.

July 20, 1922. Teit's illness over the preceding year had severely curtailed progress on reviewing the Royal Commission's report, and Ditchburn and Clark chose to proceed with reviewing the allocations in agencies – excluding the Williams Lake Agency, among others – "in which it was thought no contention would be met with from the Indians whom Mr. Teit was particularly representing." While the work had been in abeyance, Clark had left for India for two months to pursue his immigration work of encouraging demobilized British officers to settle in British Columbia. With Clark absent and Teit disabled, but the province still desiring an early settlement, Ditchburn had suggested that W.W. Baer, who was "very well informed on Indian matters and [had] the confidence of Mr. Teit and his friends," be appointed in Clark's place.[271] This suggestion was not implemented, and, upon his return, Clark resumed his duties with Ditchburn.

On November 5, 1922, British Columbia's Commissioner of Grazing, Thomas P. MacKenzie, wrote to C.E. Wynn-Johnson, a rancher in the Alkali Lake area, to gather information to assist in the final disposition of the "Indian range problems." He noted the use of range land by the Indians on "many small reservations near Alkali Lake," and particularly the "tentative reservation" placed by the Royal Commission on the lands comprising IR 18, before inquiring:

> Would you please give me your opinion as to whether the Indians in that locality really need all that land for summer grazing. If so, what do you think about its allotment to the Indians and its fencing and use by them as long as it is required? This would mean they would be required to keep their stock on their own allotment. I am planning similar action in several localities and wish in all cases to be backed by the stockman's opinion.

Wynn-Johnson's response of November 10, 1922, was predictable, given the conflicting desires of the Indians and the ranchers:

> This matter was not taken up by the Royal Commission at their sessions, but was added to their report afterwards in view of a reported action on the part of the Provincial Government, which would make the Indians keep all their stock within fence. I have some recollection of being spoken to about it in Victoria, but they said it was too late to incorporate in the report. As the matter stands at present, the Indians have

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[271] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, July 20, 1922, NA, RG 10, vol. 7784, file 27150-3-13, part 1 (ICC Documents, pp. 406-08).

[272] Thomas P. MacKenzie, Commissioner of Grazing, to C.E. Wynn-Johnson, November 5, 1922 (ICC Documents, pp. 409-10).

> practically no cattle, although they have a large number of useless cayuses. I do not think that they would have any difficulty in keeping their stock on their numerous reservations, and their evidence at the session of the Commission would bear that out.
>
> The proposed reservation composes, with their present reserves, the whole of that valley known as Alkali Lake Creek valley, and almost the only open country in that section. In the early summer we drift our cattle up that valley to the back country, where we are trying to hold them, so as to preserve this open country for the Indians and ourselves in the fall. It is the main source of water and in fact, in a year like this, almost the only water not on the reserves.
>
> If you have seen the country, and I do not think you had an opportunity of doing so, I think you would agree with me that to allow them to fence that valley would destroy this section as a stock country.[273]

In a reply dated November 22, 1922, MacKenzie stated that it was his intention to require the Indians to fence their existing reserves for the purpose of containing their horses. He also indicated that, not previously knowing the number of cattle or horses the Indians had at that time, he had been thinking of allotting additional range to them if they could not comfortably keep their stock on their existing reserves. He would have required the Indians to fence the new allotments as well, "upon which they could carry on their live-stock so that there would be no interference or friction between the Whites and Indians in the use of the range."[274]

By this time, Teit had died, his only recommendation regarding the interior Indians being "a general statement he made on more than one occasion that [they] needed additional grazing lands."[275] Ditchburn, acting on instructions from Scott dated August 12 and November 17, 1922, met with Kelly to discuss the selection of alternative representatives for the Indians. On November 28, Ditchburn wrote to Scott:

> The information I elicited from Mr. Kelly and his co-workers confirmed the very strong suspicion I have had for some time, which was that the Allied Tribes Association did not truly represent the whole of the Indian tribes of British Columbia. While this Association has a strong following among the Nishga Indians, it has on its roll also a number of Indians belonging to different tribes but these tribes as bodies have held aloof from this Association; at the same time there are a number of tribes of

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[273] C.E. Wynn Johnson to Thomas P. MacKenzie, Commissioner of Grazing, November 10, 1922 (ICC Documents, pp. 411–12).

[274] Thomas P. MacKenzie, Commissioner of Grazing, to C.E. Wynn Johnson, November 22, 1922 (ICC Documents, p. 413).

[275] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, January 17, 1923, NA, RG 10, vol. 7784, file 27150-3-15, part 1 (ICC Documents, p. 415).

> which none of their members are in any way connected with it. – in fact ignore it altogether.
>
> In view of the foregoing I have formed the opinion that the Allied Tribes Association cannot be given any special recognition in the matter of saying who shall sign the treaties and feel that representatives of the different tribes should be appointed at meetings of the tribes called by the Indian Agents at which authorization should be given to those who are selected empowering them to sign the treaties.
>
> I feel that each treaty should cover an Agency as at present constituted, as it would then mean that when the treaties are signed the Aboriginal Title will have been extinguished over the whole of the Province. The Peace River section has already been dealt with under Treaty No. 8. The Indians of the southern portion of Vancouver Island, Nanaimo and Fort Rupert, signed treaties with the Hudson's Bay Company in the early days and so possibly the tribes in these sections need not necessarily have signatories to the treaties.[276]

Clearly, Ditchburn believed that ultimately the federal government would still have to embark on some form of treaty negotiations with the Indians after the two governments had completed resolving their differences.

On January 8, 1923, Ditchburn met with Clark to discuss winding up their review of the Royal Commission's report. Ditchburn became concerned when he learned that Clark had received no instructions to deal with any reserve matters other than the allocations made by the Royal Commission:

> I therefore deemed it important to have an interview with Hon. Mr. Pattullo and [on January 9, 1923] explained the situation as I understood it and asked him how far he was prepared to go to meet the reasonable requests of the Executive Committee of the Allied Tribes. His reply was to the effect that he could not answer this question until he was in a position to know just what they were asking for, and I informed him that so far as I could see from the lists supplied me the Indians on the Coast were asking to be granted a considerable number of fishing stations and those of the Interior wanted increased grazing areas. I suggested that the most practical thing to do would be for Major Clarke and myself to go over these additional applications together and make our recommendations as to what we thought necessary.
>
> The Minister refused to have the matter dealt with by Major Clarke and requested that I should prepare a statement showing the additional reserves asked for. This work I am now engaged upon and hope to have it completed within a week, after which Major Clarke and I will turn our attention to finishing up the work so far as the Report itself is concerned. This should be fairly plain sailing.[277]

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[276] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, November 28, 1922, NA, RG 10, vol. 11047, file 33 General, part 6, NA, RG 10, vol. 11302, reel T-16114 (ICC Exhibit 12).

[277] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, January 17, 1923, NA, RG 10, vol. 7784, file 27150-3-13, part 1 (ICC Documents, pp. 414-15).

Ditchburn chastised the Allied Tribes for the report it had prepared for the province on November 12, 1919, which claimed that the Royal Commission had not gone far enough to meet the reasonable needs of the Indians. The fact that in recent months Teit, Kelly, Paull, and Ambrose Reid had gone out among the Indians to determine whether they wanted more land than they already had "goes to show that they did not know what they were talking about." He added, however, that, because the provincial Grazing Commission concurred with Teit's view that interior bands required more grazing lands "and is making recommendations that certain large areas should be set aside for the Indians in the lower part of the Okanagan Agency, and also in the Kootenay and Williams Lake Agencies, [he did] not anticipate much difficulty in obtaining these."[278] Ditchburn later reiterated this belief in a letter to Indian Agent A.O. Daunt, in which he wrote: "Referring to the matter of acquiring more hay for the Alkali Lake Indians, as shown on the tracing which you forwarded to me some time ago, I beg to say that I have every hope of being able to obtain the majority of these allottments [sic]."[279]

After his meeting with Patullo on January 9, Ditchburn reported one week later on the progress he had made in providing the Minister of Lands with a list of additional lands being sought by the Allied Tribes:

> [W]ith regard to further applications for reserves submitted by the representatives of the Allied Tribes Association I beg to say that I have been going through these during the past week and expect, within a very short time, to be able to lay before you a full tabulation of the lands which I think might properly be allowed. I observe, however, that among the applications there are requests for large territorial reserves and also a general demand that both old and new reserves should be enlarged to comprise sufficient land to allow of 160 acres per capita. Like requests have been made ever since 1871 and have always been refused and I feel that you will also refuse these. I would, however, like to receive from you at your earliest possible convenience a letter to that effect in order that the Indians may be so informed at the next meeting we are to have with them in the near future when the question of the extinguishment of the Aboriginal Title will be dealt with.
>
> While the lists submitted to me are somewhat extensive I am going through them to find out if there is any possibility of obtaining the lands by an inspection of the Provincial blue-prints to ascertain their status. The consequence will be that a very large percentage of the reserves must be eliminated, either on account of lands being alienated, or, in my opinion, their not being necessary.

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[278] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, January 17, 1923, NA, RG 10, vol. 7784, file 27150-3-13, part 1 (ICC Documents, pp. 415-16).

[279] W.E. Ditchburn, Chief Inspector of Indian Agencies, to A.O. Daunt, Indian Agent, February 8, 1923, NA, RG 10, vol. 11062, file 33/16, part 1, reel T-16094 (ICC Exhibit 13).

> What I will submit to you will be a list of further fishing stations of small areas with a few small plots of alleged arable land for the Indians of the Coast Agencies. Grazing areas will also be applied for for the Indians of the Lower Similkameen, Lower Kootenay, Anaham and Alkali Lake Bands, which I feel certain will be endorsed by your Grazing Commissioner, Mr Mackenzie, as he is fully in touch with the requirements in these sections of the country.[280]

Ditchburn completed his review of the lands requested by the Allied Tribes in addition to the allotments made by the Royal Commission and wrote again to Patullo on February 10, 1923. As he had expected, Ditchburn had been forced to eliminate a large number of the requested parcels that had been previously alienated by the province. He commented on the desirability of obtaining grazing reserves for a number of interior bands:

> Your Grazing Commissioner has discussed this matter with myself on several occasions and he is fully impressed with the necessity of establishing grazing reserves on which the Indians may run their horses and cattle in order that there may be no conflict with the white stock raisers.
>
> The question of the compulsory cut-offs appears to be a very sore point among the Indians.[281]

Although he did not specifically mention the Alkali Lake Band in his letter, he attached, among other things, a list of additional lands, apparently totalling some 5,007 acres including August Martin's pre-emption of 40 acres, sought by the Allied Tribes for the Alkali Lake Band:

> ALKALI LAKE BAND
>
> The Alkali Lake Indians of this Agency have been for many years cutting hay for their stock from a number of meadows on vacant Crown lands and the Agent therefore recommends that these be set aside for them. There are 182 Indians in the Band and they have a considerable number of good cattle and horses. Stock raising is their chief vocation as on their reserves there is not much agricultural land and the opportunities for obtaining water are very limited. The Allied Tribes Committee did not have the opportunity of visiting the Williams Lake Agency. The following are the parcels of hay lands desired, which I would respectfully ask be allowed –

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[280] W.E. Ditchburn, Chief Inspector of Indian Agencies, to T.D. Patullo, Minister of Lands, January 16, 1923, NA, RG 10, vol. 11046, file 33/General, part 8, reel T-16087 (ICC Exhibit 11, tab 6).

[281] W.E. Ditchburn, Chief Inspector of Indian Agencies, to T.D. Patullo, Minister of Lands, February 10, 1923 (ICC Documents, pp. 419-20).

1. BOB JOHNSON & SONS, (NOWELL, CHARLES & ALBERT):– N.E.¼, Sec. 25 & E.½, Sec. 24, Tp. 74, W.½, Secs. 18 & 19, N.E.¼, Sec. 7, Tp. 26, Lillooet District. [160, 320, 640, and 160 acres]
2. SHORT CHARLIE, DAVID GEORGE & WILLIAM MOFFAT.– Sec. 25, Tp. 43, Lillooet District. [640 acres]
3. BILLY CHELCHEL.– Sec. 27, Tp. 43, Lillooet District, excepting thereout Lot 522 of 40 acres. [600 acres]
4. JIMMY WYCOTT & BAND.– Sec. 30, Tp. 43, Fr. S.½, of Sec. 25 & fr. S.E.¼, Sec. 26, Tp. 45, Lillooet District. [640, 180, and 67 acres]
5. LOUIE WYCOTT.– E.½, of Lot 2553, Lillooet District. [320 acres]
6. ANTOINE CHARLEY.– S.W.¼, Sec. 17 and S.E.¼, Sec. 18, Tp. 74, Lillooet District. [640 acres]
7. CALEMINE KALELEST.– N.½, Sec. 4, Tp. 76, Lillooet District. [160 acres]
8. NAPOLEON BALEW & BROTHER & TOM JOHNSON.– A parcel of land surrounded by the following lots: 1960, 1961, 1962, 1964, 1967, 1970, 1965, Lillooet District, excepting thereout Lot 567. [440 acres][282]

The question of grazing lands was proving to be a sticking point, however, and Ditchburn's earlier optimism was being tested, as he reported to Scott on February 23, 1923:

> I am dealing with Major Clarke on reserve matters and now that we have got into that section of the country where large areas are concerned it is a matter of fighting every inch of the way for me to make a good showing. The Grazing Commissioner, while realizing that it is necessary that the Indians should have grazing areas for themselves, is using his influence to have some of the new reserves recommended by the Royal Commission in the Kootenay Agency eliminated but I shall protest very strongly against this.
>
> With regard to the additional grazing areas which I expect to get I cannot say at the moment just what the Government of British Columbia will do though some hints already dropped lead me to believe that they will not be inclined to constitute these areas as Indian reserves. I will use my utmost endeavours to have these so constituted and point out that it will be impossible to have any control over the same unless this is done.
>
> I would have greatly preferred if the Provincial Government had appointed somebody with broader views on Indian matters than Major Clarke has. While he is a very decent fellow, still he is inclined to be very cheese-paring where a few acres of land are concerned. For instance, if a ten acre fishing station is recommended he will want

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[282] W.E. Ditchburn, Chief Inspector of Indian Agencies, to T.D. Pattullo, Minister of Lands, February 10, 1923, enclosing list entitled "Alkali Lake Band" (ICC Documents, p. 421). The numbers in brackets represent marginal notes suggesting the acreages involved in each item, and another such note is the number "5007," which is the total of these numbers and August Martin's 40 acre pre-emption. Assuming, however, that the legal descriptions are correct, the acreages shown for Antoine Charley's two quarter sections (640 acres) and Calemine Kalelest's half section (160 acres) appear to be inaccurate. Each should be 320 acres, resulting in an overall total of 4847 acres of additional land requested for the Alkali Lake Band by the Allied Tribes.

to know if five acres would not do, and so forth. Necessarily you will see that I have to be somewhat diplomatic, but I eventually get my way.

If all goes well the work on the Report itself should be completed within the next two weeks. The supplementary list, which I submitted to the Honorable the Minister of Lands some weeks ago, will then have to be dealt with but I may not have anything to do with it as I have already cut down the applications of the Committee of the Allied Executive to an irreducible minimum."[285]

Ditchburn repeated his concerns to Scott, with specific reference to the Alkali Lake Band, on March 11, 1923:

> My negotiations with Major Clarke have proved very satisfactory except insofar as where large areas were recommended by the Commission and here the grazing policy of the Government and the attitude of the Grazing Commissioner has [sic] proved a considerable drawback to what I had hoped would have been a satisfactory settlement of the Indian reserve question.
>
> In the Williams Lake Agency the Royal Commission recommended as follows for the Alkali Lake Indians: –
>
> App. No. 9 – new reserve No. 15 – 480 acres
> 10 – 16 – 40
> 15, 17, 18 & 22 – new reserve No. 17 – 1,120 acres
> 16 – new reserve No. 11A – 110 acres
> 23 9A – 180
> 24A 18A – 3,992 acres
>
> New reserve Nos. 15 and 17 have been disallowed by Major Clarke and the Grazing Commissioner entirely.
>
> New reserve No. 18 has been cut down from 3,992 to 640 acres.
>
> The grounds for opposing these new reserves were on account that they would seriously interfere with the development of the community use of the summer range. I registered objections but this was the best I could get. This tribe, however, will not do so bad owing to the fact that I was able to impress upon Major Clarke the undesirability of cutting off Wycott's Flat Reserve No. 6, containing 1,250 acres. At first it looked as if the recommendation of the Commission for eliminating this reserve would be carried out and would have been had I not pointed out to the Grazing Commission[er] that even were it cut off it would not come under his control as the agreement of 1912 distinctly states that cut-offs and reductions must be subdivided and sold. Mr. Mackenzie, the Grazing Commissioner, therefore raised no further objection ...
>
> I had intended filing a protest with Honorable Mr. Pattullo with regard to the above-mentioned decisions when the work was completed and had no intimation that he was about to leave Victoria at an early date. I therefore think it highly essential that

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[285] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, February 23, 1923, NA, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, pp. 422-23).

> you should put this matter before him to see if he cannot allow the areas recommended by the Commission to be constituted as reserves or areas of the same extent to be located. Personally I feel that the attitude taken by the Grazing Commissioner is putting the Government of British Columbia in a position of breaking faith with regard to the agreement of 1912.[284]

Having dealt with Clark's rejection of IR 15, 17, and part of 18, Ditchburn provided Scott with copies of the lists provided to Patullo of additional lands requested by the Allied Tribes:

> Just what Mr. Pattullo will do about these I have no idea at present nor have I been able to get any information, as Major Clarke seems to be of the opinion that they would not come under his jurisdiction. The original applications have been boiled down to what is shown and I am of the opinion that they should be given as the Indians are under the impression that something more than was provided for by the Commissioners will be allowed. If these are refused no doubt there will be great dissatisfaction and both money and time will have been wasted, for had a flat refusal been given in the first place to consider anything more than the report provided for the same could have been completed over two years ago. As I have previously informed you the list comprises fishing stations for the Coast Indians and some meadow lands for the Alkali Lake Indians in the Williams Lake Agency which they have always been using. I hope that you will also be able to impress upon Mr. Pattullo the necessity of having these new reserves allotted. If this is done I feel that I could with all confidence report that the British Columbia Government have gone as far as it is possible to go in meeting the reasonable requirements of the Indians and they should be satisfied.
>
> In the grazing country this is important both in the interest of whites and Indians for it is needless for me to say that the Indians will not take kindly to having taken away from them meadow lands which they have always been using and see these given to white stock-raisers. The result might, and no doubt would, prove very disastrous. In such matters it is essential that the Indians and whites should be at peace with each other. I have taken great pains to point out this phase of the question to both the British Columbia representatives and stated that if any unpleasant circumstances are created as the result of their actions the Indian Department must not be held responsible.[285]

It seems clear that the unwillingness of Patullo and Clark to allow all of the Royal Commission's allotments stemmed from the perception of Grazing Commission MacKenzie that the Indians of Alkali Lake had sufficient grazing lands to meet their requirements and that their horses were interfering with the grazing interests of white ranchers. In notes detailing his investigations, Mackenzie wrote:

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[284] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 11, 1923 (ICC Documents, pp. 424–25 and 427).

[285] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 11, 1923 (ICC Documents, p. 427).

> Indians in vicinity of Alkali Lake do not need additional reserves.
>
> They have sufficient hay land on established reserves, if they would cultivate them.
>
> Indian Agent Daunt's letter of [illegible] is also evidence of the fact that they do not develop their lands.
>
> C.L. Wynn Johnson's letter of Nov 10, 1922 is evidence that Indians have no cattle.
>
> The Indians near Alkali Lake own bands of horses which roam over the summer range to the detriment of stockmen who are endeavouring to successfully operate cattle ranches.
>
> Stockmen are confronted with difficulty of shipping beef to market throughout summer months. The solution of the difficulty lies in the unhampered management of beef on the summer range.
>
> To transfer control of meadows throughout the Lillooet summer range to Indians will practically mean that control of the summer ranges placed in the hands of the Indians who are grazing only useless horses.
>
> Evidence from other stockmen shown by letters on file is proof that the seizure of similar meadows to those asked for by the Alkali Indians, by Indians throughout the Chilcotin is a serious menace to the progressive development of the range stock business throughout the Cariboo-Lillooet Districts.
>
> For the above reasons I will not agree to the increase in further scattered reservations for the Indians.[286]

In a separate memorandum, Mackenzie added:

> In many cases it is advisable that the Indians of the grazing Districts of Interior British Columbia have separate allotments. They have many horses of inferior grade. These horses graze on the open or grass ranges. These areas are very limited, consequently, great damage is done to the range. The Indians, in some localities, to a great extent do not cultivate their reservations. They scatter out over the range appropriating small meadows which constitute largely the beef forage for cattle. The presence of Indians on these areas with their horses interferes with the quiet grazing of cattle and the development of the beef industry. Where these conditions prevail it is proposed to assemble the Indians' horses on definite grazing allotments of Crown lands which can be set aside as commons for the Indians.

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286 Thomas P. Mackenzie, Grazing Commissioner, "In reference to recommendations of the Royal Indian Commission regarding establishment of proposed new reserves, Williams Lake Agency," undated, British Columbia Ministry of Lands, file 02676 (ICC Documents, pp. 533–540).

> These allotments are as follows:- . . .
>
> Alkali Lake allotment for Indians of Alkali Lake, Williams Lake Agency.
>
> These Indians have very few cattle but have numbers of horses ranging on summer range needed for cattle. It is essential that they be assembled on the reservations. The reserves are large enough to hold all the stock they own. They should be fenced. An area adjacent to the cut-off (I.R. No. 6 Wycotts Flats) is suggested as an allotment. This with addition to Reservations Nos. 3, 8, and 9 will be more than is needed. There is plenty of range on Crown range for cattle but not for horses.[287]

Ditchburn and Clark completed their review on March 19, 1923. Clark finalized his report for Patullo, noting that Ditchburn's views were largely in accord with his own "respecting the modifications recommended as being in the best interests of both Whites and Indians." He then summarized his recommendations, marking with a triangle those with which Ditchburn did not agree. The recommendations for Alkali Lake were *not* marked, suggesting that, notwithstanding Ditchburn's earlier objections, he and Clark concurred, subject to Ditchburn's ongoing attempts to obtain additional land for the Band from the supplemental list. As Ditchburn had forecast, IR 15 and 17 were eliminated in their entirety, and IR 18 was reduced from 3,992 acres to 640 acres; Wycott's Flat (IR 6), however, was reinstated and confirmed as a reserve. Clark's reasons were as follows:

> WILLIAMS LAKE AGENCY
>
> The Cut-offs and Additions recommended by the Royal Commission to be confirmed with the following amendments and modifications –
>
> CUT-OFF No. 6, Wycott's Flat of 1230 acres to be confirmed as a Reserve . . .
>
> APPLICATION No. 9, New Reserve No. 15, Alkali Lake, for 480 acres to be disallowed as not being reasonably required and as interfering seriously with the development of the grazing facilities of the district.
>
> APPLICATIONS Nos. 15, 17, 18 and 22, New Reserve No. 17, Alkali Lake for 1129 acres to be disallowed as per same reasons given for application #9
>
> APPLICATION No. 24A New Reserve No. 18, Alkali Lake for 3992 acres to be amended to read as follows:–
>
> The N.1/2 and Sectional S.1/2 of Section 17 and Sectional E.1/2 of Section 18, Tp. 76, being approximately 640 acres.[288]

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[287] Thomas P. Mackenzie, Grazing Commissioner, "Memorandum in reference to Summer grazing allotments for Indians," March 15, 1923, British Columbia Ministry of Lands (ICC Documents, pp. 428-29).

[288] J.W. Clark, Superintendent, Immigration Branch, to T.D. Patullo, Minister of Lands, undated, British Columbia Ministry of Lands, file 02676 (ICC Documents, pp. 449 and 459).

On receiving a copy of Clark's report, Ditchburn advised Patullo's Deputy Minister, G.R. Naden, on March 26, 1923, that his own report would be finished shortly. He appeared to confirm Clark's view that the two agreed with respect to the Royal Commission's recommendations for the Indians of Alkali Lake:

> I am in accord with the decisions arrived at by Major Clark except in the cases of the Shuswap, Columbia Lake and St. Mary's Bands of the Kootenay Agency, for whom the Royal Commission recommended one new reserve for each band. These were disallowed on the recommendation of Mr. MacKenzie, the Grazing Commissioner, it being contended that the granting of these reserves would interfere with the grazing interests of the white people.
>
> In the Williams Lake Agency the recommendations of the Commission for the Alkali Lake Band were very materially cut down for the same reason as in the Kootenay Agency, but I cannot find much complaint in this case providing the policy of the Grazing Commissioner does not result in friction between the White and Indian stock-raisers and this is a matter which I have always kept in view and impressed upon Mr. MacKenzie. You will quite readily understand that the Indians will not take kindly in having to give up meadow lands which they have been using for a great number of years and see them given to the white stock raisers. I think you will agree with me when I say that in the outlying districts of the Province it is most essential that the Whites and Indians should be at peace and harmony with one another.[280]

He went on to address the supplementary list of reserves submitted by the Allied Tribes:

> Referring to the supplementary list submitted to Hon. Mr. Pattullo on the 10th ultimo I beg to say that I feel it would be wise policy on the part of the Government of British Columbia to allow all the cases mentioned in view of the fact that the representatives of the Allied Indian Tribes were led to believe that if the Report of the Royal Commission did not go far enough their requests for more land would be favourably considered. The list I have submitted represents only a very small fraction of what they asked for, the bulk of their applications being on alienated lands or constituted large territorial areas which I considered it impossible to obtain. The applications comprise small fishing stations or hunting bases either on vacant Crown lands or lands covered by timber limits. These latter are subject, of course, to the prior rights of the licensees to the timber. There are also some meadow lands for the Alkali Lake Indians which I am of the opinion it would be advisable to give part of if not all.
>
> If you can see your way clear to recommend to your Minister that my views should be met, not only with regard to the supplementary list but also that the reserves for

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[280] W.E. Ditchburn, Chief Inspector of Indian Agencies, to G.R. Naden, Deputy Minister of Lands, March 26, 1923 (ICC Documents, pp. 455-56).

> the Bands mentioned in the Kootenay Agency be allowed to stand or other areas substituted therefor. I feel that I would then be in a position to inform my Department that the Government of British Columbia has gone as far as is possible to do in allotting lands for the Indians and it should be absolved from any further demands in this regard.[290]

The following day, Ditchburn reported to Scott, reiterating Clark's recommendations regarding the rejection of IR 15 and 17 and the reduction of IR 18 and adding with respect to Wycott's Flat:

> The Royal Commission recommended the cutting off of Wycott's Flat Reserve No. 6 of the Alkali Lake Band. Apparently the Commission arrived at this decision owing to evidence being given by the then Agent, Isaac Ogden, and the Chief of the Band that the reserve was of little use as it could not be irrigated, it being too high to permit of pumping water from the Fraser River. As the report of late Engineer Phillips, of the Dominion Water Power Branch, goes to show that irrigation is quite feasible by ditch and flume from Dog Creek, the cut-off as recommended by the Commission has been disallowed and the reserve is confirmed for the use of the Alkali Lake Band.

He was "pleased to say that Major Clark realized the necessity of going as far as he felt possible to do to meet the requirements of the Indians, and except for his decisions with regard to three new reserves for the Shuswap, Lower Columbia Lake and St. Mary's Bands in the Kootenay Agency, I have been in accord with him."[292]

RATIFICATION BY BRITISH COLUMBIA AND CANADA

Given that the reports of Ditchburn and Clark were in general agreement and largely confirmed the report of the Royal Commission "with a few amendments, additions and deductions to the Reserves confirmed, cut-offs and new reserves," Patullo proposed to Scott on April 6, 1923, that their recommendations be adopted:

> I am prepared, subject to ratification by the Lieutenant-Governor in Council, to confirm the report with the amendments, additions and deductions as recommended by Mr. Ditchburn and Major Clark upon your submitting a revised schedule of the con

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[290] W.E. Ditchburn, Chief Inspector of Indian Agencies, to G.R. Naden, Deputy Minister of Lands, March 26, 1923 (ICC Documents, p. 457).

[291] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 27, 1923 (ICC Documents, pp. 458 and 447).

[292] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 27, 1923 (ICC Documents, p. 458).

> firmations, cut-offs and new reserves, with the exception that I cannot agree to contribute towards the purchase of any of the lands as recommended.[93]

Patullo was not receptive, however, to the list of additional reserves submitted by the Allied Tribes:

> Regarding the supplementary list of reserves submitted by Mr. Ditchburn as applied for by the representatives of the Allied Tribes of British Columbia, the Provincial Government does not look thereon with favour. The Indians already have a great proportion of the chief strategical locations along the Coast which are ample for all their reasonable requirements. It is felt that if the new applications were granted few suitable locations would be left free for purposes of industry ... But beyond the matter of expediency I am of opinion that the Indian requirements are already amply met, which also was evidently the opinion of the Royal Commission.[94]

Scott agreed that the reports of Ditchburn and Clark had corresponded in most of their "essential particulars" and, like Patullo, he saw no reason why the federal and provincial governments should not invoke their powers to adopt the confirmations, cut-offs, and new reserves proposed. However, on April 9, 1923, he entreated with Patullo to reconsider the province's position on the additional reserves proposed by the Allied Tribes, given that Teit and others had been appointed to provide the Indian perspective:

> As this is a final adjustment of all claim for Indian reserves between the Dominion and the Province under the provisions of Clause 13 of the Terms of Union, we feel very strongly that these applications on behalf of the Indians should receive very careful and sympathetic consideration, and should not be refused unless for very weighty reasons.[95]

In a separate letter to Ditchburn, Scott remarked:

> We put up quite a fight for the reserves on the supplementary list but without result. Hon. Mr. Patullo gave me a memorandum which Mr. Clark prepared for him, which I send along for your information. Their claim is that it would not be in the interests of the province to grant these reserves, for the reasons set forth in the cases dealt with by Mr. Clark.

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[93] T.D. Patullo, Minister of Lands, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, April 6, 1923, British Columbia Ministry of Lands, file 02676 (ICC Documents, p. 461).

[94] T.D. Patullo, Minister of Lands, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, April 6, 1923, British Columbia Ministry of Lands, file 02676 (ICC Documents, p. 462).

[95] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to T.D. Patullo, Minister of Lands, April 9, 1923, NA, RG 10, vol. 7784, file 27150-3-15, part 1 (ICC Documents, pp. 470-73).

> The only object in employing Tait [sic] and subsequently the Indians was to enable them to be assured that their final representations had received attention, and our correspondence will show that their requests have been placed urgently and emphatically before the provincial authorities. If we do not succeed we cannot I think be fairly held responsible although the Indians will no doubt be dissatisfied.[296]

Patullo apparently acceded to Scott's request that the provincial government give further thought to the supplementary list of reserves requested by the Allied Tribes. Ditchburn's report to Scott on May 21, 1923, suggests that the provincial review had not yet been completed, although it seemed unlikely that the province would relent:

> What action the Provincial Government will take with regard to the supplementary list will be entirely outside the report of the Commission. I am inclined to believe that it is not intended to ignore this list altogether, as I have pointed out to the Provincial officials that the representatives of the Allied Tribes were encouraged by that Government to present their statement of claim and therefore it appeared to me that some favourable action should be taken with regard to these additional requests which only form a very small proportion of what they were asking for.
>
> In view of what has taken place I feel that it would have been better to have informed O'Meara, Teit and others that the Royal Commission had canvassed the Indian Reserve situation very thoroughly and that the Governments would not go any further than what the Commission reported upon as being necessary. As a matter of fact, the Commission were very liberal in their recommendations except possibly in the matter of grazing allotments, but at that time the Crown ranges were open to Whites and Indians alike so apparently they did not deem it was necessary to take the Indians' requests in this regard into serious consideration.[297]

In the meantime, Minister of the Interior Charles Stewart had written to the Allied Tribes on May 14, 1923, acknowledging, in the interests of avoiding litigation, that the Indians of British Columbia had not ceded their aboriginal title and expressing the federal government's willingness "to make reasonable arrangements, as expressed in the ... Order-in-Council [of June 20, 1914,] for the cession of this title."[298] On the same day, Scott asked Ditchburn for "suggestions as to the terms which should be offered to the Indians of British Columbia for the cession of the Indian title," to which

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[296] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.E. Ditchburn, Chief Inspector of Indian Agencies, April 6, 1923, NA, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, p. 469).

[297] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, May 21, 1923, NA, RG 10, vol. 11047, file 33/General, part 6.

[298] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, pp. 18–19.

Ditchburn responded by referring to his letter of November 28, 1922, in which he had recommended treating separately with the bands of each British Columbia agency since, in his view, the Allied Tribes did not represent all Indians in the province.[499]

In June, the Nishga Indians, anticipating federal acceptance of the work of Ditchburn and Clark, wrote to the Governor General to ask him to refuse to allow any proposed Order in Council to that effect. They invoked the assurance given by the Duke of Connaught as Governor General on September 25, 1916, that, if they did not agree with the findings of the McKenna-McBride Commission, their case would be considered by the Judicial Committee of the Privy Council, and they reiterated their earlier statements that the Commission's findings were not acceptable.[500]

On July 25 and 27, 1923, delegates of the Allied Tribes, led by Peter Kelly, met in Vancouver with Stewart, Senator Hewitt Bostock, Scott, and Ditchburn. Kelly reiterated the Indians' reticence at negotiating on the basis of the June 20, 1914, Order in Council because "we shall have surrendered all our claims to the lands of the Province, and the Province, by granting us a few reserves here and there, shall be held to have satisfied all claims of the Indians against the Province."[501] Because large areas of Indian land had already been taken up by settlers, leaving only unoccupied Crown lands open for consideration by the McKenna-McBride Commission, Kelly considered the Commission to have been appointed "fifty years too late."[502] He also objected to the power granted to the federal government under the *British Columbia Indian Lands Settlement Act* to take reserve lands without the Indians' consent, arguing that the legislation rendered it impossible for the Indians to get additional lands or a fair adjustment of all their rights:

> The Royal Commission told the Indian Tribes again and again and again that they had nothing to do with the Indians' title, that they had nothing to do with the aboriginal title, that their powers did not go that far, that the Government did not give them any power to touch that question at all, and the report of the Royal Commission would bring all matters to an end, to a settlement. We will have forfeited by its adoption our

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[499] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, May 21, 1923, NA, RG 10, vol. 11047, file 33/General, part 6.

[500] Robert Stewart, President, Nishga Tribe, David Doolan, Chairman Kincolith, Peter Calder, Chairman Greenville, Michael Inspring, Chairman Aiyansh, and Amos Gosnell, Chairman Gwinaha, to Governor General of Canada, June 4, 1923, NA, RG 10, vol. 11047, file 33/General, part 6.

[501] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, p. 28.

[502] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, p. 29.

> right to a hearing on the one stand, the one point on which we think we have ground to take a strong stand. After that is done, what shall we do? The only thing possible will be this. We will come and beg absolutely depending upon the goodwill of the Crown, with no argument to support us, with nothing to back up our claims, our aboriginal title gone. Everything that we have in our favor gone. Therefore, we are opposed to coming to an agreement under those conditions, Sir.[503]

Kelly assured Stewart that the Indians were not pressing a reference to the Privy Council for the mere sake of obtaining a decision of the highest tribunal in the British Empire, but would in fact prefer a negotiated settlement on just grounds.[504] Until such a settlement had been reached, however, the Indians were not prepared to sacrifice the basis of their position.[505]

For his part, Stewart equated the interests of the Indians and the federal government in obtaining a good land settlement from the province,[506] and he promised to deal with British Columbia's Indians on the same basis as Indians in other parts of the country.[507] He acknowledged that, on *moral* grounds, there was no question of the Indians' ownership of the lands in British Columbia they had never ceded, but he warned Kelly that the question of the Indians' *legal* title might have to be litigated.[508] He concluded:

> Orders-in-Council are awaiting this conference, the signatures have still to be attached, waiting to see just definitely where you stood in the matter, so, while we appear to have adopted the matter, we were anxious to give the fullest investigation to this matter because this conference ... was for the purpose of trying to ascertain whether or not the Indians were going to be satisfied, reasonably satisfied, and whether it would be possible to come to a satisfactory conclusion with respect to this matter.... I would not like the impression to go abroad that we intend to ride rough-shod over the Indians and the representations they make. Possibly we cannot satisfy them all ... but as far as it is possible so to do, it is our desire to pursue these discussions both with yourselves and the Provincial Government to see if we can come to an amicable arrangement. If your committee is prepared to sit around the table – I myself am not staying here, because it will consume some time – Mr. Ditchburn has

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[503] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, pp. 30-33.

[504] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, p. 46.

[505] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, p. 49.

[506] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, p. 37.

[507] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, pp. 4 and 40.

[508] "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, pp. 38 and 43.

> gone into this question with representatives of the Provincial Government. He has fought your battle, I think, as well as he could. Perhaps you think he has not succeeded as well as he might, but do not forget the fact the Provincial Government stands upon its Provincial rights...[509]

Kelly agreed to continue the discussions with Scott during the following month.

Even as Stewart and Kelly were meeting, however, the Royal Commission's report, as amended by Ditchburn and Clark, received its first official sanction on July 26, 1923. British Columbia passed Order in Council 911, which stated:

> THAT the Report of the Royal Commission of Indian Affairs as made under date of the 30th day of June 1916, with the amendments thereto as made by the representatives of the two Governments, viz. Mr. W.E. Ditchburn, representing the Dominion Government and Major J.W. Clark, representing the Province, in so far as it covers the adjustments, readjustments or confirmation of the Reductions, Cut-offs and additions in respect of Indian Reserves proposed in the said report of the Royal Commission, as set out in the annexed schedules, be approved and confirmed as constituting full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfillment of the said Agreement of the 24th day of September 1912, and also of Section 13 of the Terms of Union, except in respect to the provision for lands for Indians resident in that portion of British Columbia covered by Treaty No. 8, which forms the subject of Interim Report No. 91 of the Royal Commission. The settlement of which will be allowed to remain in abeyance until some more suitable time, but which shall not prevent the Government of the Province from dealing with vacant Crown lands under the provisions of the land laws of the Province from time to time in force and effect.[510]

The Indians and their supporters felt betrayed. The chairman of the Friends of the Indians of British Columbia, P.D. McTavish, wrote to Lieutenant Governor Walter Nichol on July 28, 1923, asking him to withhold his approval of the Order in Council if it had not already been given:

> I have before me [an] official report of [an] interview just had between [the] Minister of Interior and the Allied Indian Tribes of British Columbia. From this it would appear that at Ottawa the matter of passing [an] Order in Council adopting the Report of the Royal Commission on Indian Affairs had been deferred until the whole

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509 "Report of a meeting between the Honourable Charles Stewart, Minister of the Interior, and the Allied Indian Tribes of British Columbia," July 25, 1923, NA, RG 10, vol. 3820, file 59335, part 1, pp. 41-42.
510 Order in Council 911 (British Columbia), July 26, 1923 (ICC Documents, p. 478).

> subject of that Report and related matters shall have been discussed as is hoped between the Allied Tribes and the two Governments.
>
> From this interview as reported it would appear that at Victoria the Executive Council has already passed [a] Minute of Council adopting the Report. Possibly such Minute has been submitted for your approval.
>
> We beg to ask attention to the fact, of which most explicit and official proof can be furnished, that the whole proceeding represented by the McKenna-McBride Agreement and the Report of the Royal Commission is based upon the assumption that the Indian Tribes of British Columbia have not the territorial land rights claimed by them. This assumption in January, 1875, the then Minister of Justice of Canada described as one "which completely ignored as applicable to the Indians of British Columbia, the honor and good faith with which the Crown had in all other cases since its Sovereignity [sic] of the territories in North America dealt with their various Indian Tribes."
>
> Since that time representatives of British Sovereigns in Canada and Ministers of the Crown, including the Earl of Dufferin, Sir Wilfrid Laurier and the Duke of Connaught, have upon many occasions given to the Indian Tribes of British Columbia assurance that their land rights would be recognized and justly dealt with.
>
> Understanding that the Lieutenant-Governor of a Province is as much a representative of His Majesty for all purposes of Provincial Governments as is the Governor-General for all purposes of Dominion Government, we think it desirable to place in your hands information showing the present position of the Indian land controversy.
>
> We beg to strongly urge upon Your Honour that as the honor of the British Crown is at stake you withhold sanction from the proposed Order-in-Council until at least all outstanding issues shall have been fully discussed between the Allied Tribes and the two Governments.[311]

Having been approached by Nichol for a memorandum on the subject, Ditchburn on August 1, 1923, criticized McTavish for confusing aboriginal title with Indian reserves:

> [T]he above mentioned Society are interested in the question of the extinguishment of what is known as the Aboriginal Title in the lands of the Province outside of the reserves which have been set apart for the use and benefit of the various Indian tribes of British Columbia. This, you will realize, is a separate and distinct matter from the Indian Reserve question which is dealt with under the Thirteenth Article of the Terms of Union.
>
> The statement of Mr. McTavish "that the whole proceeding represented by the McKenna-McBride Agreement and the Report of the Royal Commission is based upon the assumption that the Indian Tribes of British Columbia have not the territorial land rights claimed by them" is incorrect and made evidently in ignorance of what had

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[311] P.D. McTavish, Chairman, Society of Friends of the Indians of British Columbia, to Walter Nichol, Lieutenant Governor of British Columbia, July 28, 1923, NA, RG 10, vol. 11047, file 33/General, part 6.

> transpired prior to the above-mentioned Agreement between the Dominion Government and the Government of the Province of British Columbia.

After briefly reciting the history of reserve land selection in British Columbia before 1912 and the subsequent role of the McKenna-McBride Commission, Ditchburn continued:

> During the itinerary of the Commission the question of Aboriginal Title came before that body on numerous occasions but they took pains to explain to the Indians that their duties were restricted to deal with Indian reserves and nothing else.
>
> From the foregoing it is quite apparent that the request for your withholding your sanction to the Provincial Order-in-Council ratifying the Report of the Royal Commission is based on a misconception of just what powers the Commission were endowed with and what the Report contained.[312]

Writing to Scott on the same day to advise him of this correspondence with Nichol, Ditchburn commented: "I think you will agree with me that this sufficiently covers the point taken up by Mr. McTavish and should divorce for all time the Indian Reserve question from that of Aboriginal Title if they were ever considered to be united."[313]

Scott remained in Victoria to canvass the Indians' position on the land question, among others. Provincial representatives were invited to attend but declined, taking the view that, "whereas the charge of the Indians and their trusteeship and management of the lands reserved for their use is a function of the Dominion Government, therefore, any conference with the Indians should be solely with the representatives of that Government"; on the other hand, "[a]ny questions arising in respect of the Indians of B.C., involving any responsibility on the part of the Province, should be adjusted as between the Province and the Dominion, and therefore it is not necessary or advisable that the Province should be represented at any conference between the Indians and the Government of Canada."[314]

Scott and representatives of the Allied Tribes met over five days in early August 1923, but the discussions did not feature the cordiality and hope that marked the earlier exchanges between Stewart and Kelly:

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[312] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Walter Nichol, Lieutenant Governor of British Columbia, August 1, 1923 (ICC Exhibit 9, tab D).

[313] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, August 1, 1923 (ICC Exhibit 9, tab E).

[314] J. Morton, Secretary, Executive Council, to W.E. Ditchburn, Chief Inspector of Indian Agencies, July 31, 1923, as set forth in Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Charles Stewart, Minister of the Interior, October 29, 1923, NA, RG 10, vol. 3820, file 59335, part 3A (ICC Exhibit 9, tab F).

> An atmosphere of mutual suspicion prevailed, and there was much futile debate and the reiteration of irreconcilable positions. Finally, the Indians did spell out the conditions under which they would be prepared to relinquish their aboriginal claims:
>
> > The right to fish without restriction, and possibly the right to sell the fish to anyone. The right to hunt for food without restriction.
> > Access to timber for personal use from public lands.
> > Reserves on the basis of 160 acres per capita.
> > Full control of reserve foreshores to low-water mark.
> > Improved systems of medical care and education.
> > Reimbursement of about $100,000 which they had already spent over the years in advancing their claims.
> > Annuities of $5 per capita retroactive over the previous twenty years.[515]

As the Victoria *Times* of August 11, 1923, reported, "the delegations asks for five times as much land as the Indians at present hold in this province."[516]

Scott considered the Indian demands to be unacceptable, since they simply repeated the proposals made by the Allied Tribes to the province in 1919 and had, besides, added the annuities claim. By Scott's calculation, assuming a 1923 population of 24,744, the claim of "the usual annuity of $5.00 per capita" over 20 years would result in a cash payment of $2,474,400 in addition to the newly quantified claim of $100,000 for the costs of pressing the claim. In his report to Stewart, he wrote:

> I cannot refrain from expressing the opinion that far from being reasonable claims, they are exacting and extravagant. Favourable consideration would lead to the expenditure of such very large sums of money on the Indians of British Columbia that an envious feeling would be created in the minds of other Indians in the Dominion....
>
> In spite of this vigorous protest from the Indians as to the acceptance of the report of the Royal Commission, I cannot, with a due sense of responsibility and having the best interests of these people at heart, recommend any other action but the adoption of the report. The Indians will receive in the aggregate a large acreage of reserve lands free from any vexatious claim of the Province, such as the so-called "reversionary interest" has been in the past. While it is true that in some districts it would have been more satisfactory if larger reserves could have been set aside for them, conditions peculiar to British Columbia rendered that almost impossible, but the report of the Royal Commission provides reserves for these Indians which can be developed and utilized by them. Over [and] against their complaint that they have not sufficient

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[515] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 152.

[516] "Indians of Province Seek Many Changes in Administration," Victoria *Times*, August 11, 1923, NA, RG 10, vol. 11047, file 33/General, part 6.

> land we must set the statement, often well founded on fact, that they are not making good use of the lands provided for them.
>
> If our Government refuses to further consider the report of the Royal Commission and [fails] to use the statutory power to confirm the report, I am afraid the future welfare of the British Columbia [Indian] will be jeopardized. The report is the [outcome of] long negotiations between the Governments, of an examination into the needs of the Indians on the ground, during which the evidence of the Indians was taken and their advice and co-operation sought, and finally, there was a resurvey of the whole report by officers of the Governments and representatives of the Indians.... With the reserve question finally disposed of I had expected that the Indians would realize that their aboriginal title was in part already annually compensated for by the generous grants that the Dominion Parliament is making on their behalf, and would wish to add to those obligations of the Dominion an extension of the educational system and some better provision for hospitals and medical attendance. Such is not the case, and I have to submit the facts for your consideration.[517]

In short, Scott recommended that the claims of the Allied Tribes be refused and that the report of the McKenna-McBride Commission, subject to the amendments of Ditchburn and Clark, be adopted.[518]

When no word emerged from the federal government as to what course it intended to follow, Kelly, Paull, and fellow Indian leader Alex Leonard travelled to Ottawa in February 1924 to respond to rumours that the federal government intended to adopt the amended report of the Royal Commission. They had prepared and presented a memorandum in which they asserted that "the professed purpose of the [*British Columbia Indian Lands Settlement*] Act [to carry out a 'final adjustment of all matters relating to Indian affairs in the Province of British Columbia' in accordance with the McKenna-McBride Agreement of 1912] had not been accomplished."[519] Scott later informed Ditchburn:

> They [Kelly, Paull, and Leonard] met a committee consisting of our Minister [Stewart], the Hon. Dr. King, the Hon. Senator Bostock and myself, and matters were pretty thoroughly discussed. At the Minister's request I took them to Mr. E.L. Newcombe, the Deputy Minister of Justice, and they asked his opinion on

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[517] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Charles Stewart, Minister of the Interior, October 29, 1923, NA, RG 10, vol. 3820, file 59335, part 3A (ICC Exhibit 9, tab D).

[518] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 209; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 152.

[519] Peter R. Kelly, Chairman of the Executive Committee, Allied Tribes of British Columbia, "Petition to Parliament," June 10, 1926, in *Appendix to the Journals of the Senate of Canada, 1926–27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), xix and xx.

> certain matters, which he gave them very frankly, to the effect that while they claimed an aboriginal title, he was doubtful whether they had any such title, and he thought the courts would not support their claim. Afterwards they submitted certain questions in writing, to which he replied.... The meeting adjourned and my understanding of the situation was that the Minister was to take up the matter again with the British Columbia Government, possibly with an attempt to get them to cancel the cut-offs and to give other considerations. Our Minister has wired to Hon. Mr. Oliver to find out whether he will be in Ottawa. So far as I know there was no promise by the Minister that our Order in Council would not pass in its present form. As we have not heard from Mr. Oliver whether he intends to come to Ottawa, the whole matter is held in abeyance.[520]

Ultimately, the delegation's efforts proved futile. As Scott had foreseen, on July 19, 1924, the federal government passed Order in Council PC 1265, which echoed the province's Order in Council of July 26, 1923, word for word.[521] As Robert Cail observes, the two governments considered that all three major Indian land issues in British Columbia had been resolved: the reversionary interest by the terms of the McKenna-McBride Agreement, and aboriginal title and the size, location, and nature of reserves by the final report as adopted by the Orders in Council. As for the members of the Allied Tribes, they felt with some regret that the door had been closed on a negotiated settlement, and they resolved to pursue their claim through the Privy Council.[522] For the members of the Alkali Lake Band, the two Orders in Council signalled not only the formal resurrection and confirmation of Wycott's Flat as IR 6, but also the disallowance of IR 15 and 17 and the reduction of IR 18 from 3,992 acres to 640 acres.[523]

THE 1927 SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

Within four months of the passing of federal Order in Council 1265, the Land Committee of the Nishga Tribe met with Prime Minister Mackenzie King in Prince Rupert in October 1924 to request, on behalf of the Allied Tribes, that its petition be referred to the Judicial Committee of the Privy Council for determination. Invoking Stewart's acknowledgment of aboriginal title in

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[520] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.E. Ditchburn, Chief Inspector of Indian Agencies, April 3, 1924, NA, RG 10, vol. 3820, file 59335 (ICC Exhibit 9, tab C).

[521] Order in Council PC 1265 (Canada), July 19, 1924 (ICC Documents, pp. 488-500).

[522] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 210.

[523] As noted previously, the area of IR 18 increased to 703 acres in 1927 following survey by D.M. MacKay.

1923. Roche's assurance in 1916 that the Indians' attendance before the McKenna-McBride Commission would not prejudice the case before the Privy Council, and Laurier's promise to assist with the reference, the Land Committee deplored the fact that the Department of Indian Affairs, in an effort to force a settlement with the Indians, had withheld funds the Indians desired to pursue the claim. In an implied rebuke of Allied Tribes' counsel Arthur O'Meara, King replied that the government did not want the Indians to "spend a large sum of money when it is not necessary" and wished to avoid seeing "persons interested in promoting appeals ... bleed the Indians." He did agree, however, to stand by the statements of past and existing ministers of the federal Crown and to discuss with Stewart the steps required to secure "absolute justice" for "the original inhabitants of this country."[324] Yet, by 1927, the federal government enacted the "notorious"[325] section 141 of the 1927 *Indian Act*, which made it an offence, punishable by a fine of not more than $200 and not less than $50 or by imprisonment not exceeding two months, for any person to receive or solicit funds from an Indian "for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band."[326]

On April 23, 1925, Kelly, Paull, and George Matheson, as delegates of the Allied Tribes, met with members of the federal cabinet[327] to present a memorandum in which they protested the federal government's failure to reply to the conditions of equitable settlement proposed in the 1919 submission to the provincial government and in the meetings with Scott in Victoria in August 1923. They also outlined the position they felt forced to take in light of the Orders in Council adopting the amended report of the Royal Commission. In particular, they informed the government that, although their primary objective remained a negotiated settlement, they realized that they must press on to the Privy Council with their claim to aboriginal title over the large proportion of British Columbia to which they had not ceded their original sovereignty. In addition, they believed section 109 of the *Constitution Act, 1867*, preserved

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[324] "Report of Interview with the Prime Minister of Canada," October 13, 1924, NA, RG 10, vol. 11047, file 33 General, part 6; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 152.

[325] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 157.

[326] *Indian Act*, RSC 1927, c. 98, s. 141.

[327] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 268.

"all territorial land rights claimed by the Indian tribes" as an "interest" in the public lands of the province.[528]

Arthur Meighen in opposition asked Stewart in the House of Commons on June 26, 1925, to clarify the status of the Indian lands issue in British Columbia and explain why the federal government did not permit the Indians of British Columbia to take their case to the Privy Council. Stewart replied that, "although the McKenna-McBride agreement had been carried out, it had in no way satisfied the Indians, 'but inasmuch as the provincial government were threatening to cancel the arrangement altogether if we did not take action,' that agreement and the ensuing report had had to be ratified."[529] He recognized that the Indians were entitled to obtain a decision from the Privy Council on the Indian land question and agreed that the federal government would sanction such a reference, but he indicated that the government would not be justified in funding the Indians' representatives unless "something very concrete" was presented.[530]

To this the Allied Tribes replied that the memorandum they had prepared for the British Columbia government in 1919 *was* "something very concrete."[531] They seized on Stewart's statement in the House of Commons as a promise to facilitate a reference to the Privy Council, contending that "the principal matter now requiring to be discussed between the allied Tribes and the Government of Canada is the particular method by which the Government will facilitate securing such decision."[532] A subcommittee of cabinet was asked to look into the question, but, given Scott's view that the Indians had been "fairly compensated" for their aboriginal title in the form of reserves and other government services, he advised in a lengthy report dated July 14, 1925, against challenging British Columbia in court. He pointed out, as Brian Titley notes:

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[528] Allied Indian Tribes of British Columbia, "Supplementary Memorandum: Nature and Extent of Rights Claimed," April 23, 1925, NA, RG 18, vol. 3312, file HQ 1054-1-2.

[529] Canada, House of Commons, *Debates*, June 26, 1925, 4995, as cited in Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 241.

[530] Canada, House of Commons, *Debates*, June 26, 1925, 4994, as cited in Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 242; Peter R. Kelly, Chairman of the Executive Committee, Allied Tribes of British Columbia, "Petition to Parliament," June 10, 1926, in *Appendix to the Journals of the Senate of Canada, 1926–27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), xx and xxi.

[531] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 139.

[532] Allied Indian Tribes of British Columbia, "A Summary," September 1, 1925, NA, RG 10, vol. 11047, file 33/General, part 6.

> Should the Indians win, "there [would] be a cloud on all the land titles issued by the province, and this point [had] always been an obstacle in the way of the reference." Going to the courts became less practicable with the passing of time and was even less so now that the report of the royal commission had been confirmed by both governments. He advised that it was best to avoid judicial proceedings and instead to continue the prevailing policy of increasing expenditure on education and health, thereby "nominally according full compensation for any aboriginal title in the lands." ... [A]fter all, his department was spending far more on the Indians of British Columbia than they could ever get from a treaty and ... the annuities paid under the treaty system were "a questionable benefit."[352]

The Allied Tribes prepared a new petition in December 1925 and presented it to Parliament on June 10, 1926, where it received first reading in the House of Commons the following day.[353] Although "the main purpose [of the petition] was to secure a court decision on the question of aboriginal title,"[354] a new ingredient in this proposal was the Indians' call for a parliamentary committee to assess "the petition and all related matters."[355] The Allied Tribes endorsed the idea of a parliamentary inquiry on October 29, 1926, and Kelly met with Stewart in November to secure his consent. Over Scott's opposition, the federal cabinet decided in February 1927 to create a Special Joint Committee of the Senate and House of Commons to investigate the Indians' claims, and Stewart announced the plan in the House of Commons on March 6.[357] British Columbia, as it had done with regard to the meetings involving Stewart, Scott, and the Allied Tribes in the summer of 1923, declined to participate.[358]

On March 30 and 31, and April 4, 5, and 6, 1927, the Special Joint Committee received oral and documentary evidence from eight witnesses, including Scott, Ditchburn, Paull, Kelly, Chief John Chillihitza of the Nicola Valley Indian Band, and Chief Basil David of the Bonaparte Indian Band. Arthur O'Meara appeared as counsel for the Allied Tribes, but his reputation as an "agitator" preceded him and he was coldly received. His ability to represent the interior bands, including Alkali Lake, was also thrown into doubt when lawyer Alec D. Macintyre from Kamloops, with the support of Chiliihitza and David, claimed to be acting on their behalf. Kelly and Paull were accorded polite if occasionally skeptical treatment, their submissions based in large measure on the November 12, 1919, statement prepared by the Allied Tribes at the request of the province. Scott, who initially opposed the Committee's establishment, effectively took control of the proceedings by presenting a lengthy opening statement that set the historical framework for the submissions made by all the remaining witnesses. In addition to providing statistics comparing the benefits received by Indians in British Columbia with those received by Indians under treaties in other parts of Canada, he attended the remainder of the inquiry, interjecting with comments or questions as he perceived the need to arise.

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[353] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 153.

[354] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 153.

[355] George Edgar Shankel, "The Development of Indian Policy in British Columbia," unpublished doctoral thesis, University of Washington, August 1, 1945, p. 260.

[356] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 153; Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 140.

[357] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 154.

[358] Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961), 140.

Following the hearings, the Committee took just three days to issue its report, which it did on Saturday, April 9, 1927. Although the Committee praised Kelly and Paull for their "forcibly expressed" yet "highly acceptable" presentations, it disagreed with the Allied Tribes' claim that the Indians of British Columbia had never been conquered, and noted the divergence between the Allied Tribes and the Indians of the interior on the question of aboriginal title. It concluded that the claim to aboriginal title was a recent innovation promoted by men like O'Meara who saw the Indian land issue as an opportunity for personal gain, but that such title did not exist historically because there was no evidence of it being conveyed from generation to generation. The Committee denied the existence of aboriginal title and refused to support a judicial reference on the issue, laying the blame on the Allied Tribes for its failure to take advantage of the conditional offer set forth in the Order in Council of June 20, 1914:

> Having given full and careful consideration to all that was adduced before your Committee, it is the unanimous opinion of the members thereof that the petitioners have not established any claim to the lands of British Columbia based on aboriginal or other title, and that the position taken by the Government in 1914, as evidenced by the Order in Council [of June 20, 1914] and [Minister of Justice Charles] Doherty's letter [of November 14, 1914, advising O'Meara that the federal government had no power or authority to refer a case directly to the Privy Council], afforded the Indians full opportunity to put their claim to the test. As they have declined to do so, it is the

> further opinion of your Committee that the matter should now be regarded as finally closed.[339]

The Committee was evidently persuaded by Scott's evidence, which favourably compared the benefits received by Indians in British Columbia, despite the absence of treaties, with those received in other provinces where Canada had negotiated treaties with the aboriginal inhabitants. The Committee then addressed point by point the conditions proposed as a basis of equitable settlement in the Allied Tribes' statement of November 12, 1919. It treated as one claim the Indians' demands for beneficial title to 160 acres of average agricultural land per person, including sufficient water in dry areas, with compensation for inequalities in acreage and value and a scheme for compulsory purchase where insufficient lands were available. To this the Committee responded that the reserves and associated resources set apart under Article 13 of the *Terms of Union*, whether by the Joint Reserve Commission of 1876, the single Commissioners, or the McKenna-McBride Commission, were "held by the Dominion in trust for the full and permanent beneficial interest of the Indians." When the reserves as reviewed and adjusted by the McKenna-McBride Commission were confirmed, "any provincial interests would disappear and the Dominion, in trust for the Indians, would have the full use and benefit of these reserves."[340]

On the question of referring disagreements between the governments and the Allied Tribes on reserve allotments to the Secretary of State for the Colonies, the Committee responded tersely that such a reference was to be made under Article 13 of the *Terms of Union* only "if the two governments failed to agree," but since they *had* agreed "under statutory authority," the allotment of reserves was therefore considered to have been concluded.[341]

Finally, and somewhat ominously, the Committee recommended that "the decision arrived at should be made known as completely as possible to the Indians of British Columbia by direction of the Superintendent General of Indian Affairs in order that they may become aware of the finality of the findings and advised that no funds should be contributed by them to continue further presentation of a claim which has now been disallowed."[342]

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[339] Hewitt Bostock, Chairman, "Report," April 9, 1927, in *Appendix to the Journals of the Senate of Canada 1926–27: Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), vii, viii and x.

[340] Hewitt Bostock, Chairman, "Report," April 9, 1927, in *Appendix to the Journals of the Senate of Canada 1926–27: Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), xi, xii.

[341] Hewitt Bostock, Chairman, "Report," April 9, 1927, in *Appendix to the Journals of the Senate of Canada 1926–27: Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), xii.

With the approval of the report of the Special Joint Committee by both the Senate and the House of Commons, the Committee's recommendations took on the force of law. A "spent force,"[343] the Allied Tribes, "never closely knit at best, fell apart."[344] Although O'Meara sought to keep the movement alive, he placed himself in jeopardy of prosecution under section 141 of the *Indian Act*, according to Scott writing in February 1928.[345] But O'Meara's days of advocating for the Indians of British Columbia were virtually done. On April 2, 1928, at the age of 66 years, he died suddenly of heart disease at his home in Chilliwack.[346]

SURVEY AND CONVEYANCE OF RESERVES

With the adoption of the report of the Special Joint Committee by Parliament, the only steps still to be completed to finally resolve the reserve question in British Columbia were the survey of the reserves, the checking and confirmation of the surveys by both governments, and the conveyance of title from British Columbia to the federal government. This work was already well under way, having been started following the passing of provincial Order in Council 911 and federal Order in Council PC 1265 accepting the recommendations of Ditchburn and Clark.

On April 28, 1926, surveyor D.M. MacKay was instructed to survey reserves in the Williams Lake Agency, including the new reserves at Alkali Lake and in particular the disallowed IR 17.[347] Ditchburn was quick to notice this error, and he contacted MacKay directly on May 28, 1926, to clarify the instructions.[348] By September 20, 1927, MacKay reported that his surveys for the Alkali Lake Indians were nearing completion.[349] Once he had finished, he forwarded his field notes to Surveyor General J.E. Winbach, who sent them on to Indian Affairs' Assistant Deputy and Secretary J.D. McLean on November 15, 1927, following MacKay's return to Victoria to make some minor corrections.[350] Eleven days later, MacKay delivered his progress report and sketch plans of the reserves covered by the Alkali Lake Band's applications 10, 16, 23, and 24A,[351] and the following March he reported that his field notes for the Alkali Lake surveys had been submitted to British Columbia's Surveyor General.[352] On April 27, 1928, he submitted his final report:

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[342] Hewitt Bostock, Chairman, "Report," April 9, 1927, in *Appendix to the Journals of the Senate of Canada 1926–27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), xvii.

[343] Wilson Duff, *The Indian History of British Columbia*, Vol. 1, *The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), 70.

[344] Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958), 101.

[345] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.E. Collison, Indian Agent, February 16, 1928, NA, RG 10, vol. 3823, file 59335-5.

[346] "Man Who Aided B.C. Indians Dies," Victoria *Times*, April 4, 1928, NA, RG 10, vol. 3823, file 59335-5.

[347] Unidentified author to D.M. MacKay, BCLS, April 28, 1926, NA, RG 10, vol. 7790, file 27160-1, part 1 (ICC Documents, p. 501).

[348] W.E. Ditchburn, Chief Inspector of Indian Agencies, to unidentified recipient, May 28, 1926, NA, RG 10, vol. 7790, file 27160-1, part 1 (ICC Documents, p. 503).

[349] D.M. MacKay, BCLS, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, May 28, 1926, NA, RG 10, vol. 7790, file 27160-1, part 1 (ICC Documents, p. 504).

> Alkali Lake Indians.
>
> On August 30th [1927] I established my camp near the north west corner of Little Spring I.R. No. 8, our water supply being obtained from a good, never failing spring near by.
>
> Areas covered by applications Nos. 23 [IR 9A] and 24A [IR 18 as reduced] were surveyed from this camp, the survey of the area under application No. 24A being undertaken first.
>
> This Reserve [IR 18 as reduced], which comprises fractional section 17 and fractional East ½ of Sec. 18 Tp. 76, is wooded with Pine and scattered Poplar. The soil is light and dry with occasional rock outcrops.
>
> Reserve No. 9A (application No. 23) is the south ½ of Section 23. The land is of value because of its wild hay meadow. The hay crops here could be greatly increased by clearing the clumps of willows which are scattered throughout the meadow.
>
> Indian Reserve No. 11A (application No. 16) was given lot number 5398. The meadow areas of this reserve are beginning to suffer from the spread of (Hordeum jubatum) commonly known as foxtail. I understand this grass is not indigenous to this country but nevertheless is spreading at a rapid rate. This grass is suitable as feed while green, but not once it heads out and ripens, at which time the sharp seed-pod causes physical injury to sheep and cattle by piercing the membrane of the mouth and setting up inflammation. The Indians should be encouraged to use every effort to systematically destroy this grass which is killing out the natural grass of their meadows.
>
> On September 19th I moved to that part of the west bank of the Fraser River opposite Alkali Lake Creek, known as the Gang Ranch area. From here I carried out the survey of the area covered by application No. 10 [IR 16] which was given lot number 5400. For some years a portion of this lot was cultivated by the Alkali Lake Indians, potatoes, corn, and other garden produce being grown successfully. In recent years lack of sufficient water for irrigation purposes has caused the Indians to

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[350] J.E. Winbach, Surveyor General, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, November 15, 1927, NA, RG 10, vol. 7790, file 27160-1, part 1 (ICC Documents, p. 508).

[351] D.M. MacKay, BCLS, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, November 26, 1927, NA, RG 10, vol. 7790, file 27160-1, part 1 (ICC Documents, p. 506).

[352] D.M. MacKay, BCLS, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March [illegible] 1928, NA, RG 10, vol. 7790, file 27160-1, part 1 (ICC Documents, p. 518).

> discontinue the cultivation of this tract and at the time of survey the area was overgrown with weeds.[353]

At senior levels of government, however, new issues continued to thwart the federal government's ability to secure title to the reserves in British Columbia for another ten years. The province hoped "to retain rights to Indian lands that did not prevail elsewhere" so that it could reclaim reserve lands without compensation for roads, canals, bridges, and other public works.[354] Another change in government at the provincial level in 1928 further served to delay the conveyancing, although Scott and British Columbia's Superintendent of Lands, Henry Cathcart, were able to reach an agreement that appeared to resolve all outstanding issues outside the Railway Belt and the Peace River Block. But with the surveys completed by 1931, and Scott anxious to finalize the matter before his retirement in 1932, issues relating to the Railway Belt again served to delay the transfer of title. Once that issue had been resolved, the province then raised the question of excluding base and precious metals, timber, and other natural resources from the conveyance. In a final compromise worked out between the two governments, as Brian Titley explains,

> [t]hey agreed that the conveyance would include timber and minerals with the exception of precious metals. The long-awaited transfer took place shortly afterwards on 29 July [1938] by provincial order-in-council 1036. 592,296.897 acres of reserve land were involved. After sixty-seven years of irresolution and vacillation, British Columbia had finally fulfilled its obligations under Clause 13 of the Terms of Union. And the province's troublesome reversionary interest in Indian lands, except in cases where a band became extinct, was finally put to rest.[355]

Three days later, on August 1, 1938, Deputy Provincial Secretary T. Walker forwarded a certified copy of the Order in Council to the Superintendent General of Indian Affairs.[356] A subsequent schedule of Indian reserves in Canada showed the Alkali Lake Band with its 14 pre–McKenna-McBride Commission reserves plus IR 9A (a 250-acre extension of IR 9), 11A (a 131-acre addition to IR 11), and 16 (a 39-acre reserve named Old Clemence).[557] The schedule expressly excluded IR 15 and 17 as having been "[d]isallowed by Royal Commission" and depicted IR 18 as containing, instead of the 3,992 acres recommended by the McKenna-McBride Commission, 703 acres – an increase of 63 acres as a result of MacKay's survey from the 640 acres estimated by Ditchburn and Clark.[558]

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[353] D.M. MacKay, BCLS, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 27, 1928, NA, RG 10, vol. 7790, file 27160-1, part 1 (ICC Documents, pp. 521-24).

[354] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 158.

[355] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 160.

[356] T. Walker, Deputy Provincial Secretary, to Superintendent General of Indian Affairs, August 1, 1938 (ICC Documents, p. 537).

The net impact of the McKenna-McBride Commission, as amended by Ditchburn and Clark, had been to increase the Alkali Lake reserves by 1,116 acres, from the 8,347.5 acres set apart by O'Reilly to 9,463.5 acres. However, the work of Ditchburn and Clark had reduced the Band's recommended land base by 3,569.02 acres from the 13,032.52 acres originally proposed by the McKenna-McBride Commission.

USE OF IR 15, 17, AND REMAINDER OF 18 BY THE ALKALI LAKE BAND

The record in this inquiry reveals a great deal regarding the historical use of IR 15, 17, and 18 and other reserves by the members of the Alkali Lake Band. Arthur Dick pointed out to the Indian Claims Commission at the May 2, 2000, community session that family trees prepared by the First Nation showed ancestors of current members residing in the area as far back as people could remember and at least as early as 1800.[559] At that session, elder Willard Dick talked of the meaning of "Petmetkwe," the name given to IR 15 and 17:

> Water coming out of the ground. See, that's where this creek come out of the ground. It boils right out of the ground. It's just a big hole like that and it comes out there, maybe three or four, then it forms a creek and it comes – starts down, and there's some more as it come further down some more, coming right out of the ground. And as it comes, it gets larger. That's the creek that goes right by here.[560]

Competition with white settlers commenced in 1861 with the pre-emption by H.O. Bowie and Philip Grinder and Bowie's subsequent acquisition of another 320 acres of land in 1867 after he had bought out Grinder's interest.[561] The Alkali Lake Indians in 1864 acquired a limited 40-acre reserve at their principal village site near Bowie's pre-emption within the boundaries of present-day IR 1. When the Band and others in the Williams Lake Agency had not yet been visited by Commissioner Sproat by 1878 despite widespread pre-emptions in the area, they threatened to take possession of the lands and crops of white settlers unless their land rights were somehow protected. Commissioner O'Reilly finally visited in 1881 and set apart the 3,587.5 acres in IR 1 through 7, but he was hampered in his efforts since virtually all of the good land in the area had already been pre-empted or purchased although, in his words, it "should never have been disposed of until the Indian claims were defined."[562] He reported that the members of the Alkali Lake Band were already heavily involved in ranching, owning significant numbers of cattle and horses.

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[557] As a result of the 1927 survey by D.M. MacKay, the net area of IR 9A, 11A, and 16 increased from 330 acres to 420 acres: IR 9A increased from 180 to 250 acres and IR 11A from 110 to 131 acres. IR 16 decreased from 40 to 39 acres.

[558] Canada, Department of Mines and Resources, Indian Affairs Branch, Schedule of Indian Reserves in the Dominion of Canada, Part 2, Reserves in the Province of British Columbia, March 31, 1943 (ICC Documents, pp. 331–339). An additional reserve – IR 4A containing 522.40 acres – appears to have been added to the schedule at some point after its original printing, but there is no evidence before the Commission to explain this parcel.

[559] ICC Transcript, May 2, 2000, pp. 63 and 79 (Arthur Dick).

[560] ICC Transcript, May 2, 2000, pp. 44–45 (Willard Dick).

In 1895, with Indian Superintendent Powell having acknowledged 12 years before that the Alkali Lake reserves were "unsatisfactory,"[563] band members had been outraged at the bid by settler William White to pre-empt a meadow which they had drained and improved at considerable effort and which they had been using for a number of years. Dispatched to lay out additional reserves for the Band, O'Reilly reported that "they have recently complained of a scarcity of hay land as their bands of cattle and horses have largely increased";[564] he established IR 8 through 14, which contained a number of hay swamps that band members were already in the habit of using, increasing the Band's total landholding by 4,760 acres to 8,347.5 acres.

When the McKenna-McBride Commission arrived at Alkali Lake in 1914, band members submitted 17 additional applications for reserve land. In appearing before the Commission to speak to application 9, relating to the land that eventually became IR 15, Jimmy Decker testified that, in the seven years he had been using the lands, he had erected a cabin, a stable, and fencing and had cleared two acres of the seven to eight acres of land on which he had been cutting, on average, eight tons of hay per year.[565]

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[561] Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1864–1925," prepared for the Alkali Lake Band, October 15, 1992, pp. 25–26 (ICC Exhibit 5c).

[562] Peter O'Reilly, Indian Reserve Commissioner, to Superintendent General of Indian Affairs, November 28, 1881, NA, RG 10, vol. 3663, file 9803, BCARS B1391 (ICC Documents, pp. 88–95).

[563] I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, November 7, 1883, NA, RG 10, vol. 3663, file 9778, part 1 (ICC Documents, pp. 114–15).

[564] Peter O'Reilly, Indian Reserve Commissioner, to Hayter Reed, Deputy Superintendent General of Indian Affairs, September 26, 1895 (ICC Documents, pp. 220–21).

[565] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, July 10, 1914 (ICC Documents, pp. 294–95).

With regard to IR 17, Old Dick Johnson, Tommy Johnson, and David Dan gave evidence with regard to their respective applications 15, 17, and 18. Old Dick Johnson wanted certain naturally irrigated meadow lands where he cut about five tons of hay annually; he had already built a house and stable there and had partly fenced and cleared the lands.[566] Tommy Johnson desired one square mile of hay and pasture land that he had been using for about eight years to cut about 10 tons of hay annually; he had cleared two or three acres of the land that he had improved with a house, a barn, some fencing, and a dam for irrigation purposes.[567] David Dan testified that he had been using the land he sought for seven years, had developed a stackyard there, and cut about six tons of hay per year.[568] Louis Kaleste did not testify before the Royal Commission, but application 22 for the remaining portion of IR 17 indicated that for eight years he had been cutting about 10 tons of hay annually on the land he requested, and had erected a house, stable, shed, and stackyard.[569]

As for IR 18, evidence from the May 2, 2000, community session confirms that current Band members and their ancestors resided on the land and used it for additional pasture, but in addition, before the McKenna-McBride Commission, the Alkali Lake people sought the whole of IR 18 to connect several of the Band's small reserves – specifically, IR 2, 3, 8, and 9 – into one larger landholding.[570] Counsel for the First Nation suggested in his written submissions that the lands contemplated by Antoine Spahan's application 23 formed part of IR 18,[571] but our own review of the evidence indicates that application 23 was separately approved by the McKenna-McBride Commission and eventually became IR 9A. Application 24A alone comprised 3,992 acres, the total area – as ordered by the McKenna-McBride Commission in its Minute of Decision of May 27, 1916 – that eventually became IR 18.

At the May 2, 2000, community session of the Indian Claims Commission, elders of the Esketemc First Nation provided further evidence regarding the

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[566] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, July 10, 1914 (ICC Documents, pp. 303-04).

[567] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, July 10, 1914 (ICC Documents, pp. 298-99).

[568] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, July 10, 1914 (ICC Documents, pp. 306-07).

[569] Isaac Ogden, Indian Agent, Williams Lake Agency, to Royal Commission on Indian Affairs for the Province of British Columbia, October 24, 1914, BCARS, vol. 11020, file 512D, reel B5658, Exhibit K11, McKenna-McBride Commission (ICC Documents, p. 528).

[570] Isaac Ogden, Indian Agent, Williams Lake Agency, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs in British Columbia, May 22, 1914, NA, RG 10, vol. 11020, file 512B (ICC Documents, p. 281); Ashdown H. Green, BCLS, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, January 10, 1916, NA, RG 10, vol. 11004, file 33-16, part 2 (ICC Exhibit 11, tab 5); Patricia A. Berringer, "Alkali Lake Reserves #15, #17 and #18: The History of Alkali Lake Reserves IR #15, IR #17 and IR #18, 1861-1925," prepared for the Alkali Lake Band, October 15, 1992, p. 50 (ICC Exhibit 3c).

[571] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 4.

Band's use of IR 15, 17, and 18. Jimmy Johnson, the son of Tommy Johnson, stated that his parents had moved to IR 17 in about 1912, where his father and uncles, David and Abel Johnson, used the meadows to cut hay for their horses and cattle. They also hunted and trapped to obtain food. The Indians were the only people he could recall living on and using those lands. He recalled spending much of his childhood, other than when he was away at residential school, on IR 17, where his family and others had erected cabins, barns, fencing, and stackyards and lived year round; when he was out of school in the summer, he would rejoin his family on IR 17. During his childhood and in later years as a young man, he was unaware that IR 17 did not form part of the First Nation's reserves, and he did not learn this until the 1950s, when he last lived on IR 17 to look after his uncle's horses:

> That's one thing that keeps -- keeps coming back to me. Why did they do it, cut off the land? You know, it would be something if – it would be different if people didn't even live up there at the time they cut the land off. When I learned that, it seemed like I didn't get the meaning till my brother was talking about it.[572]

In the 1950s, the beavers had started damming the creeks and flooding the area, and because a new school had been started at Alkali Lake, many of the people who had resided on IR 17 moved to Alkali Lake, some finding work in the mills and others scattering to find other employment.[573]

Willard Dick provided similar evidence, both orally and by means of a statutory declaration dated March 11, 1996. He was born on IR 17 in 1932 and, like his mother and his brothers and sisters, he grew up and lived there all year; the family raised cattle and horses, cut hay, grew potatoes and other vegetables, picked berries in the summer months, and trapped in the winter. His father, Matthew Dick, lived on IR 17 for many years prior to Willard's birth, and the family had a cabin, a barn, stackyards, and farming implements. Willard recalled about 15 families totalling some 50 people having to live on IR 15 and 17 to cut hay because IR 1 was not big enough and did not have enough hay to meet everyone's requirements. He also remembered Clemine Kaleleste living on IR 18 and having a cabin and barn there. After Clemine became too old, he left and no one lived there for a number of years; more recently, six to eight houses were built on that reserve. Willard remarked that his father had also erected two cabins, a barn, and a yard on IR 18. Willard spent most of his life on IR 17 until he was about 30 years of age, when the sawmills opened and he became a logger. At about the same time, the school opened and people "stopped going back out there" to the meadows. Like Jimmy Johnson, he had been unaware that the lands were not reserves, instead believing they were because his brother and others had discussed seeing the survey posts used to mark off the lands. He remembered seeing the posts himself at a very early age. Although questions had arisen in his mind when logging companies started cutting on lands he had thought were reserve lands, he stated that he had not learned that IR 15, 17, and part of 18 were not reserves until only five or six years prior to his appearance before the Indian Claims Commission. He said that the last time he could recall members of the First Nation cutting hay on those lands was in the 1960s, but he added that they were still using lands outside the reserves – "the government call it Crown land but we call it our land" – to the present day.[574] As for the current state of the three reserves, he stated:

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[572] ICC Transcript, May 2, 2000, p. 29 (Jimmy Johnson).
[573] ICC Transcript, May 2, 2000, pp. 19–39 (Jimmy Johnson).

> I think most of the 17 and 18 is pretty well logged all the way around. There's just a little patch coming through the 17. But the 15, I think, just logged on both sides. There's a little bit of timber left on one side.[575]

He added that IR 15 and 17 are no longer being used by the First Nation, but that it continues to use IR 18 – presumably referring to the unsurrendered portion.[576]

Hazel Johnson testified that her grandparents and great-grandparents had lived on Petmetkwe and that she herself had resided on IR 17 for many years following her birth in 1929. She recalled her family living there year round and coming down to IR 1 only for holidays like Christmas and Easter. To sustain themselves and their animals, they cut hay, picked berries, hunted, cut wood for winter, and constructed a cabin, a barn, and a yard. She has no recollection of the lands being "cut off" but did remember Indian police who had as one of their functions the responsibility for ensuring that non-natives did not enter the community, including the lands in the meadows.[577]

Antoinette Harry, the daughter of Mitchell and Matilda Dick, was born in 1939 and lived on the meadow lands until 1962. Although she left Alkali Lake to attend residential school, she returned to the meadows during her school holidays; her family resided there all year to cut hay, trap, and hunt. The family stopped going back to the meadows following her mother's death in 1960 because Antoinette's brothers and sisters were attending the new school at Alkali Lake. She recalled very few white people visiting the area, including the Indian agent; she had little contact with members of the First Nation who resided on IR 18, although she understood that people were living there. She remembered members of the First Nation receiving rations, but recalled that they had to be picked up at the store in Alkali Lake because they were not delivered to the meadows. She learned only recently that IR 15, 17, and part of 18 were not reserves – she had no previous recollection of people saying anything about those lands not being reserves.[578]

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[574] ICC Transcript, May 2, 2000, pp. 40–58 (Willard Dick); Statutory Declaration of William Willard Dick, March 11, 1996 (ICC Documents, pp. 518–521).

[575] ICC Transcript, May 2, 2000, p. 52 (Willard Dick).

[576] ICC Transcript, May 2, 2000, pp. 56–57 (Willard Dick).

[577] ICC Transcript, May 2, 2000, pp. 85–91 (Hazel Johnson).

Theresa Paul lived on IR 17 from her birth in 1919 until at least 1939, and has also resided on IR 15 and 18. She and her husband Walter had a house and stable and worked with Louis Dan to put up hay on IR 17 for their horses and cattle. When asked by Commissioner Corcoran whether her people had always owned horses and whether her father used them to work the land, Theresa responded:

> Yes, horses was the main means of travelling and working up there, like haying and stuff and hunting. Horses was the main use, not like what we have with cars ... [H]e [my father] probably could have sold some too, but the main use was for the purposes of the land.[579]

They also hunted, dried meat, picked berries, and cut wood for building, fencing, and heating. At one time they had a cabin on IR 18, as did Willard Dick, and she remembered that reserve being fenced by the Band and used for pasture. She recalled the main reasons for people leaving the meadows were to avoid the flooding caused by the beavers and to permit the children to attend school. She claimed that she had never known those lands to be anything other than Indian lands.[580]

Laura Harry, the daughter of David Johnson, lived on IR 17 following her birth in 1920 until she left to marry and reside on IR 4 in 1948. Her grandparents had a cabin on IR 18 and she stayed there with them overnight from time to time. She remembered many people on IR 15 and 17 and their cabins, stables, corrals, and the good water that bubbled out of the ground. She and her husband continued to visit IR 17, where they would hunt, fish, and pick berries. She recalled band members putting up hay and cutting wood for fencing and stackyards. There were no conflicts over land because there were no white people in the area other than the Indian agent and a rancher named Wayne Johnson. It was only when the school was built in Alkali Lake in 1958 or 1959 that the Indian agent made people stay down at IR 1, although Laura also recalled that at about that time "the beaver got the best of us up there" by flooding the meadows. She did not learn that the Esketemc people were not supposed to be on IR 15, 17, and part of 18 until her father told her that, after he had been there "for years and years ... now they're telling us that it's not ours."[381]

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[578] ICC, Transcript, May 2, 2000, pp. 91–98 (Antoinette Harry).
[579] ICC, Transcript, May 2, 2000, p. 106 (Theresa Paul).
[580] ICC, Transcript, May 2, 2000, pp. 99–100 (Theresa Paul).

Arthur Dick is Willard's son, and he lived on IR 17 until 1968 with his grandfather Matthew "to keep the place up and keep the place going" after Willard had left to work. He recalled about six families cutting hay in the meadows as late as 1958 to 1960, and that the cabins, corrals, and other improvements were still intact and looked fairly new as of 1965. He also remembered participating and hearing of other families taking part in sweats and other ceremonies while he lived on IR 17. He stated that band members had moved away from the meadows in the 1956–58 period when the school opened, but he also believed that the Catholic Church had played a part in congregating the people at Alkali Lake. He had heard his uncle Richard, as well as David and Jim Johnson, speak of the reserve's corner posts, and stated that he himself had seen three of the 10 posts of which he was aware. Accordingly, he had always believed that the lands belonged to the Band until 1978 or 1979, when he became involved in doing work for the community. He stated that the meadow lands are still vacant and that members of the First Nation continue to use them for hunting and to "do what they need to do to stay reconnected to the land." There was also some shared grazing with the white ranchers, but that had changed "since I guess forestry started to get involved." In particular, he described what the lands meant to him:

> I was really torn up myself, being taken away from there and brought to their residential school, and I used to wonder how my grandfather felt and how the other people felt when they had to leave, because there was a lot of I guess other things I experienced on account of that. And to me, they were taking away part of our lives. They were taking away our roots. They were taking away our livelihood ...
>
> My grandfather, he never said too much. But I watched him when we left [IR 17], that last year we left. I watched him. There was a sadness in his eyes. And that was in 1968. He never told me anything, but he didn't want to leave. We left when it was dark. To my recollection, after that he never went back. Like it was dark when we left. He probably knew he wasn't going back. He didn't want to see what he was leaving. I was just behind him there. He just told me, "I want you to go ahead." I had a white

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[381] ICC Transcript, May 2, 2000, pp. 110–29 (Laura Harry).

> horse and he said, "I'll follow you, you go ahead and I'll follow you, we'll go." I knew he didn't want to leave, but there was nothing I could do.
>
> So I think about that, how he must have felt. I watched, I guess – I watched the police, RCMP, as they took my dad away. He doesn't remember, but I remember that, the police taking him away. Some of those things, I still remember. I thought I've kind of dealt with them all, but when something like that is taken away from you, I'm not going to forget. I seen it in my grandfather's eyes.[382]

Charlie T. Johnson did not appear at the Indian Claims Commission's community session, but his statutory declaration of March 11, 1996, was filed in evidence. He indicated that his grandparents began to live on IR 17 in about 1907 with his father Tommy Johnson and his uncles David and Abel Johnson. He recalled living on IR 17 until 1958, when the school was built and the forestry people (who were coming to cut the timber) told them the reserves had been disallowed and they would have to leave their houses, buildings, and fences. He remembered other band members residing on the lands and using them for growing and cutting hay, hunting, trapping, cutting timber, and gathering berries and other things for medicines.[383]

Chief Andy Chelsea informed the Indian Claims Commission that the community at Alkali Lake did not really exist in the 1920s and 1930s because most members of the Band lived up in the meadows, and some continued to do so into the 1960s. He stated that hunters continue to use the lands in the fall. The First Nation's population having grown from 168 in those earlier years to over 400 in the 1970s, efforts to recover the lands commenced after he became Chief in 1973. At that time, Indian Agent Eric Underwood apparently informed band members that, "[i]f you guys are using it [the land], keep using it, but we don't want to know about it." Chief Chelsea testified that two or three ranches encompassed the west end and another 400 acres of the "cut off" portions of IR 18, and that virtually all of the remainder of IR 18 had been logged.[384] In a letter dated June 26, 2000, counsel for the First Nation added that other portions of IR 18 not within these ranches had been allocated as grazing area to rancher Clark Tucker.[385]

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[382] ICC Transcript, May 2, 2000, pp. 59-83 (Arthur Dick).

[383] Statutory Declaration of Charlie T. Johnson, March 11, 1996 (ICC Documents, pp. 541-47).

[384] ICC Transcript, May 2, 2000, pp. 129-45 (Chief Andy Chelsea); ICC Transcript, September 26, 2000, pp. 179-80 (Stan Ashcroft).

[385] Stan Ashcroft, Ganapathi Ashcroft and Company, to Jeffrey Hutchinson, Department of Justice, June 26, 2000 (ICC Exhibit 7A).

PART III

ISSUES

The parties agree that, in assessing whether Canada owes a lawful obligation to the Esketemc First Nation arising from the purported exclusion of IR 15, 17, and 18 from the First Nation's reserve land base, the Commission must consider the following issues:

1 Did the Esketemc First Nation suffer a loss which is capable of being negotiated under the Specific Claims Policy?

2 Did the McKenna-McBride Commission lawfully set apart,

   (a) the south half of Section 15 and the southeast quarter of Section 14, each in Township 43, Lillooet Land District, comprising some 480 acres (IR 15);
   (b) Section 21, the northeast quarter of Section 20 and the south half of Section 29, each in Township 43, Lillooet Land District, comprising some 1,120 acres (IR 17); and
   (c) Lots 11, 12, 13 and 14, each in Township 78, Lillooet Land District, and Lots 16, 17 and 18, the southwest quarter of Section 21, and the northeast quarter of Section 7, each in Township 76, Lillooet Land District, comprising some 3,992 acres (IR 18)

   (collectively referred to as the "Lands") as reserves, as that term was defined in the *Indian Act* of the day, for the use and benefit of the Alkali Lake Band?

3 If the McKenna-McBride did not lawfully set apart the Lands as reserves, were the Lands *de facto* reserves before, at the time of, or after the Lands were dealt with by the McKenna-McBride Commission?

4 Did W.E. Ditchburn and J.W. Clark exceed their authority with respect to the Lands? If so, did that create a lawful obligation on Canada?

5 Did Canada owe a statutory duty, fiduciary duty or trust responsibility to the Alkali Lake Band to:

(a) protect and preserve the Lands for the Alkali Lake Band;
(b) obtain reserve status for the Lands and have them set apart for the use and benefit of the Alkali Lake Band;
(c) obtain adequate alternate land as reserve set apart for the use and benefit of the Alkali Lake Band;
(d) obtain or pay monetary compensation to the Alkali Lake Band for the Lands;
(e) invoke Article 13 of the *Terms of Union* admitting British Columbia into Canada;
(f) take the position that the Lands fell within the purview of subsection 91(24) of the *Constitution Act, 1867*; and/or
(g) invoke Section 37A of the *Indian Act* of 1910?

6 If Canada owed a statutory duty, fiduciary duty or trust responsibility to the Alkali Lake Band, did Canada breach such duty or responsibility?

7 Did Canada, through W.E. Ditchburn, owe a fiduciary duty or duties to the Alkali Lake Band to:

(a) represent the Band's interests during the discussions with J.W. Clark and Grazing Commissioner Thomas A. MacKenzie regarding the potential cut-offs; and
(b) seek adequate alternative lands to be added to the Alkali Lake reserves?

If so, did Canada breach any such duty or duties?

8 Did Canada owe a duty of care to the Alkali Lake Band under the circumstances and, if so, was the federal government negligent in failing to:

(a) protect and preserve the Lands for the Alkali Lake Band;
(b) obtain reserve status for the Lands and have them set apart for the use and benefit of the Alkali Lake Band;
(c) obtain adequate alternate land as reserve set apart for the use and benefit of the Alkali Lake Band;

(d) obtain or pay monetary compensation to the Alkali Lake Band for the Lands;
(e) invoke Article 13 of the *Terms of Union* admitting British Columbia into Canada;
(f) take the position that the Lands fell within the purview of subsection 91(24) of the *Constitution Act, 1867*; and/or
(g) invoke Section 37A of the *Indian Act* of 1910?

9 Is Canada estopped from arguing that the Lands were not, or are not, reserves?

Although the parties dealt with the first issue at the end of their submissions, that issue is, in our view, preliminary in nature, since it deals with the mandate of the Commission to consider the claim. If we lack jurisdiction, it would be inappropriate for us even to address the remaining issues. For this reason, we propose to deal with the jurisdictional issue first. We should also point out that we have not addressed the remaining issues in precisely the manner laid out by the parties.

In addition, as we discussed in Part I of this report, we are referring to the separate parcels of the Lands as described in the second issue as IR 15, 17, and 18, respectively, just as the parties have done. This is for ease of reference only and is not intended to suggest that the Commission has prejudged the issue of whether the Lands actually became reserves, either *de jure* – in conformity with all legal requirements – or *de facto* – without meeting all the legal requirements but nonetheless a reserve for all practical purposes. Similarly, the use of the word "cut-offs" is not intended to represent explicit or implied acknowledgement that IR 15, 17, and 18 were reserves – in which case "cut-offs" would be apt terminology for the disallowances of IR 15, 17, and part of IR 18 following the work of Ditchburn and Clark – or that they were *not* reserves – in which case the term "cut-offs" might not be appropriate. We will deal with the question of whether IR 15, 17, and 18 were reserves in the course of our discussion of the second and third issues. Our findings there will determine whether the disallowances of IR 15 and 17, and the partial disallowance of IR 18, constituted cut-offs of *actual* reserves or merely reductions in *proposed* reserves.

PART IV

ANALYSIS

ISSUE 1 THE COMMISSION'S JURISDICTION

Did the Esketemc First Nation suffer a loss which is capable of being negotiated under the Specific Claims Policy?

The Commission's mandate has already been set forth in Part I of this report, but, given the nature of Canada's submissions on this point, our authority to conduct inquiries pursuant to the *Inquiries Act* is worth repeating. The Order in Council of September 1, 1992, states

> that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[86]

The Specific Claims Policy is set forth in the 1982 booklet published by the Department of Indian Affairs and Northern Development referred to earlier and entitled *Outstanding Business: A Native Claims Policy – Specific Claims*. In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the provisions of *Outstanding Business*, which states:

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[86] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

> The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.[587]

The Specific Claims Policy itself defines "lawful obligation" in this manner:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[588]

Canada submits that the Esketemc First Nation has not suffered a loss capable of being negotiated under the Specific Claims Policy because its claim does not fall within one of the four circumstances enumerated in *Outstanding Business*. First, according to counsel, there was no treaty or agreement whereby the Alkali Lake Band agreed to have the federal government represent its interests during the McKenna-McBride hearings, nor did the parties agree that the Band would receive IR 15, 17, and 18; Canada could not even purport to enter such an arrangement without the concurrence of British Columbia.[589] By way of contrast, the First Nation submits that the people of Alkali Lake agreed to abide by the decisions of the McKenna-McBride Commission regarding reserves and, accordingly, are entitled to invoke the first instance of lawful obligation because the federal government failed to keep its end of the bargain by maintaining the reserves as constituted by that Commission.[590]

Second, Canada contends that its actions did not breach the *Indian Act*, the *British Columbia Indian Lands Settlement Act*, or British Columbia's *Indian Affairs Settlement Act*. Counsel argues that IR 15, 17, and 18 were merely *recommended* by the McKenna-McBride Commission and could not be "set apart" as reserves under the *Indian Act* without approval by both levels of government. Moreover, because in Canada's view that Commission's role was merely advisory, the powers of the Governor General in Council and the Lieutenant Governor in Council under the latter two statutes were *not* limited to simply adjusting, readjusting, or confirming reductions or cut-offs, but also included the power to make final determinations with respect to additions to reserves.

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[587] *Outstanding Business*, 19, reprinted (1994) 1 ICCP 171 at 179.
[588] *Outstanding Business*, 20, reprinted (1994) 1 ICCP 171 at 179.
[589] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 97–98.
[590] ICC Transcript, September 26, 2000, p. 57 (Stan Ashcroft).

The First Nation counters that Canada breached its statutory obligations in a number of respects. Although the *British Columbia Indian Lands Settlement Act* may have authorized the cut-offs of *existing* reserves as directed by the McKenna-McBride Commission to be undertaken without surrenders, the legislation did not permit the *additions* ordered by that Commission to be disallowed or reduced without consulting or obtaining the consent of the Alkali Lake people under the *Indian Act*'s surrender provisions, or without at least entering into the sort of "further agreements" contemplated by that legislation or its provincial counterpart.[591] Canada further failed its statutory obligations, in counsel's submission, by failing to supervise Ditchburn properly to ensure that he inquired fully into the Band's land requirements and took appropriate steps to see that those requirements were satisfied.[592]

Third, Canada contends that, although the disputed additions directed by the McKenna-McBride Commission – IR 15, 17, and 18 – were used and occupied by band members and treated by them as their own both before and after the allotments by that Commission, they were not "Indian assets" under the next category of lawful obligation because they were never set apart as reserves.[593] Counsel for the Esketemc people, however, replies that the very language in the Specific Claims Policy on which Canada relies is not exhaustive: the fact that the two *principal* categories of Indian assets are identified as reserve lands and band funds means that there are *other* types of Indian assets contemplated by the Policy.[594] The implication of this argument is that, even if IR 15, 17, and 18 did not constitute reserves, those lands – and the houses, barns, corrals, implements, sweat lodges, and other buildings and improvements on those lands on which band members expended their time and money – were still Indian assets that had been taken away, bringing the First Nation within the third category of lawful obligation.

Fourth, Canada argues that the facts of this case disclose no illegal disposition of Indian land under the last enumerated category of lawful obligation because only reserve lands constitute Indian land. In taking this position, counsel relies in part on section 2(e) of the 1927 *Indian Act* which defines "Indian lands" as "any reserve or portion *of a reserve* which has been surrendered to the Crown,"[395] suggesting that the term is "connected to reserve lands or lands which were once reserve lands."[396] The First Nation disputes this conclusion, noting that the terminology used in *Outstanding Business* would appear to distinguish between reserve lands and other Indian lands – for example, the statement that land-related claims "find their origin in such areas as the taking of *reserve lands* without lawful surrender by the band concerned or failure to pay compensation where *lands* were taken under legal authority."[397] Accordingly, if Canada had intended the fourth category of lawful obligation to refer to reserve lands, it should have said so in express terms; IR 15, 17, and 18 "were clearly Indian land in that even if they were not reserves, they were set apart and distinct, and they could not be pre-empted or sold or used by anybody other than Esketemc after the McKenna-McBride Commission made its orders."[398]

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[591] ICC Transcript, September 26, 2000, pp. 40–41 (Stan Ashcroft).
[592] ICC Transcript, September 26, 2000, p. 57 (Stan Ashcroft).
[593] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 99.
[594] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 19.

Finally, Canada submits that, even if the four enumerated heads within the Specific Claims Policy are not exhaustive, it is unnecessary to go beyond the four heads because the First Nation has failed to establish that Canada breached a fiduciary obligation or acted negligently in this case. Alternatively, if the First Nation is predicating its claim upon traditional use and occupancy of the lands comprising IR 15, 17, and 18, then it is not properly before the Indian Claims Commission; in Canada's view, the First Nation should instead be framing its claim before the British Columbia Treaty Commission or the courts because *Outstanding Business* provides that "[c]laims based on unextinguished native title shall not be dealt with under the specific claims policy."[399] Counsel for the First Nation responds that, given the decision of the Supreme Court of Canada in *Guerin v. The Queen*[400] having been handed down after *Outstanding Business* was written, the Indian Claims Commission has found on a number of occasions that the enumerated categories in the Specific Claims Policy are not exhaustive and that a breach of fiduciary obligation can constitute a basis for claim under the Policy."[401]

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[395] *Indian Act*, RSC 1927, c. 98, s. 2(e). Emphasis added.

[396] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 100.

[397] *Outstanding Business*, 11, reprinted (1994) 1 ICCP 171 at 178; Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, pp. 19-20.

[398] ICC Transcript, September 26, 2000, p. 58 (Stan Ashcroft).

[399] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 100; *Outstanding Business*, 30, reprinted in (1994) 1 ICCP 171 at 185.

[400] *Guerin v. The Queen*, [1984] 2 SCR 335.

The Commission has dealt with the issue of its jurisdiction in a number of cases, most recently in its interim ruling on the claim of the Kluane First Nation with regard to the effects of creating a game sanctuary and national park reserve on lands traditionally used and occupied by that First Nation.[402] We have also had the opportunity to address the question in the Cormorant Island claim of the 'Namgis First Nation,[403] as well as with specific reference to the land allotments of the McKenna-McBride Commission in other reports on claims of the 'Namgis First Nation and the Mamaleleqala Qwe'Qwa'Sot'Enox Band.[404] In the Kluane ruling – released shortly after the parties had completed their oral submissions in the present inquiry – we held it sufficient to say that *the basis on which the claim is being put forward* falls within our jurisdiction, after which we can determine whether the First Nation has managed to establish its claim on the merits.[405]

In the course of the foregoing inquiries, we have arrived at a number of basic principles that can assist us in deciding whether our mandate contemplates a claim like the present one:

- The four enumerated circumstances of lawful obligation in *Outstanding Business* are merely *examples* of Canada's lawful obligations and are *not* intended to be exhaustive.[406]
- Given that the Specific Claims Policy was written before the watershed decision of the Supreme Court of Canada in *Guerin* regarding the Crown's fiduciary relationship to aboriginal peoples, it is not surprising that fiduciary obligations were not specifically listed as lawful obligations in *Out-*

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[401] ICC Transcript, September 26, 2000, pp. 52–55 (Stan Ashcroft).

[402] ICC, *Interim Ruling – Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000).

[403] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3.

[404] ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), reported (1998), 7 ICCP 109; ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199.

[405] ICC, *Interim Ruling – Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 9.

[406] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3 at 73; ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), reported (1998), 7 ICCP 109 at 187; ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 270; ICC, *Interim Ruling – Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 19.

standing Business.[107] It is now well settled that the Crown's fiduciary relationship with First Nations can provide a distinct source of legal or equitable obligation.[108]

- The Specific Claims Policy was intended to provide for the settlement of legitimate, long-standing grievances[109] without the involvement of the courts.[110] Therefore, any technical, narrow interpretation of the Policy that would hinder the resolution of such grievances should be avoided if other interpretations giving effect to the Policy's underlying purpose are equally plausible.[111]
- If *Outstanding Business* was intended to be restrictive, there would have been no need specifically to exclude claims such as those brought by individuals and those based on unextinguished aboriginal rights or title. Rather, these sorts of specific exceptions should be considered as having been carved out of an otherwise broad policy[112] – a "catch-all" for dealing with virtually all conduct-related historical grievances.[113]
- The concept of "lawful obligation" is the essence of the Specific Claims Policy. It is, by definition, a fluid and evolving concept because the nature and scope of those obligations which are, in law, owed to First Nations will continue to evolve through the process of judicial determination in Canada. The inherent wisdom and justice of the Specific Claims Policy resides in its reliance upon an evolving definition of that which is lawful and owing.[114]

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[107] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998) 7 ICCP 3 at 75-76; ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), reported (1998) 7 ICCP 109 at 187-88.

[108] ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), reported (1998) 7 ICCP 109 at 188; ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998) 7 ICCP 199 at 270; ICC, *Interim Ruling: Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 19-20.

[109] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998) 7 ICCP 3 at 75-76.

[110] ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), reported (1998) 7 ICCP 109 at 188.

[111] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998) 7 ICCP 3 at 76; ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998) 7 ICCP 199 at 271; ICC, *Interim Ruling: Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 15.

[112] ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 271-72.

[113] ICC, *Interim Ruling: Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 15.

[114] ICC, *Interim Ruling: Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000) at 15.

- A claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy.[45]

With these general principles in mind, it is important to characterize a particular claim properly to determine whether it falls within the Specific Claims Policy or the Comprehensive Claims Policy. As we discussed in our interim ruling on the claim of the Kluane First Nation:

> In our view, the general intent of *In All Fairness* [the Comprehensive Claims Policy] is to establish a framework for the negotiation of settlements of aboriginal land claims in Canada. The policy refers repeatedly to the essence or "thrust" of comprehensive claims being the exchange of "general and undefined Native title" and "undefined aboriginal land rights" for "concrete rights and benefits." It seems apparent from our review of the policy as a whole that comprehensive claims are contemplated as issues arising as a matter of ***the existence and content of aboriginal rights or title*** rather than grievances resulting from ***Canada's past conduct***.... Canada developed the Comprehensive Claims Policy to deal with these broad status-related claims, and then dealt with the residual conduct-related claims in ***Outstanding Business***...
>
> In our opinion, where a claim involves a grievance arising out of Canada's ***conduct*** in a specific, isolated incident, the presence of unextinguished aboriginal rights or title is merely ***incidental*** to the overall claim. In such circumstances, in our view, the claim cannot be said to be ***based on*** unextinguished aboriginal rights or title and will not fall within the exclusive purview of the Comprehensive Claims Policy. The very essence of the Specific Claims Policy is the resolution of these types of historical grievances.
>
> Historical grievances of this nature are to be distinguished from cases in which the parties are exchanging undefined aboriginal land rights for concrete rights and benefits. In such cases, which turn on ***the existence and content of aboriginal rights or title***, the claims can be said to be "***based on*** unextinguished native title" within the meaning of guideline 7 [of ***Outstanding Business***], and on this basis they lie ***outside*** the Specific Claims Policy – meaning that the comprehensive claims process is clearly at play. Such claims are based upon unextinguished native title because they involve, at least to some extent, the surrender or relinquishment of all or some aspects of a First Nation's undefined aboriginal land rights – including perhaps the First Nation's traditional use and occupancy of some parts of the land – in exchange for the sort of

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[45] ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), 7 ICCP 109 at 188; ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 272–73; ICC, *Interim Ruling: Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000) at 22.

> concrete rights and benefits contemplated by agreements like the Yukon Umbrella Agreement and its band-specific final agreements.[116]

In the present case, the initial basis of the Esketemc claim is that the allotments made by the McKenna-McBride Commission constituted either legal or *de facto* reserves that could not be taken away without appropriate surrenders under the *Indian Act*. Even if the First Nation is incorrect in this submission, the *basis* of its claim, by Canada's own definition in *Outstanding Business*, clearly falls within the last three categories of lawful obligation in the Specific Claims Policy. Similarly, if IR 15, 17, and 18 were not reserves but constituted some other form of Indian land or asset, the question of whether the disallowance and reduction of these lands was wrongful falls within the same three categories, regardless of whether the First Nation's position is ultimately proven.

As to Canada's contention that, on the facts of this case, there is no agreement or statute, and no Indian fund, Indian land, or other asset, on which a claim may be based under the Specific Claims Policy, it is our view that the manner in which the issues have been framed leads to the conclusion that these are questions of substance, not jurisdiction. Alternatively, even if the First Nation should fail on all the foregoing questions, the Commission must still consider whether Canada's conduct in finalizing the work of the McKenna-McBride Commission through Ditchburn and Clark amounted to a breach of fiduciary obligation. We can decide this issue only by considering it on its merits and not on the basis of a simple assertion by Canada that a claim based on breach of fiduciary obligation has not been made out.

Moreover, we do not see how Canada can argue that claims such as this one are based on traditional use and occupancy when the entire history of reserve selection in British Columbia has been predicated on the repeated *denial* of aboriginal rights and title. Successive governments in British Columbia claimed that no such rights existed. In hearings before the various bands and tribes from 1913 to 1916, the McKenna-McBride Commission regularly quoted its terms of reference as precluding it from considering the question of aboriginal title. The Special Joint Committee of the Senate and House of Commons found that the Indians had failed to establish a claim based on aboriginal title and took forceful steps to have the matter treated as definitively closed and to prevent the collection of funds for the "further presentation of a claim which has now been disallowed."[417] In our view, in the wake of these facts, it is unseemly for Canada to suggest that a claim arising out of the process of reserve selection in British Columbia is anything other than specific in nature. Nevertheless, even if the claim might be viewed as entailing issues of traditional use and occupancy, we are prepared to conclude, as we did in the Kluane report, that the presence of these issues is merely incidental to the fundamental question of whether Canada's participation in modifying the conclusions of the McKenna-McBride Commission constituted a specific, isolated breach of Canada's fiduciary obligations to the First Nation.

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[116] ICC, *Interim Ruling: Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 12 and 25.

Finally, we would observe that, although these matters may be compensable in negotiations at the comprehensive claims table, there was some dispute in the Kluane inquiry as to whether Canada was prepared to negotiate similar claims where lands were alleged to have been misappropriated. As we noted in our interim ruling in that inquiry, it is in the interests of both Canada and a First Nation to agree to resolve both past grievances and future issues in comprehensive claims negotiations, and, if they are able to do so, the Specific Claims Policy need not be engaged. That does not mean that a First Nation should be precluded from advancing the claim as a specific claim where that process offers a means of resolving historical grievances and past injustices arising out of Canada's conduct.

Accordingly, the claim falls within the Specific Claims Policy and is eligible for review by the Indian Claims Commission.

ISSUES 2 AND 3 IR 15, 17, AND 18 AS RESERVES OR *DE FACTO* RESERVES

Did the McKenna-McBride Commission lawfully set apart IR 15, 17, and 18 as reserves, as that term was defined in the *Indian Act* of the day, for the use and benefit of the Alkali Lake Band?

If the McKenna-McBride did not lawfully set apart IR 15, 17, and 18 as reserves, were those lands *de facto* reserves before, at the time of, or after being dealt with by the McKenna-McBride Commission?

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[417] Hewitt Bostock, Chairman, "Report," April 9, 1927, in *Appendix to the Journals of the Senate of Canada 1926–27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), vii.

The Esketemc First Nation and Canada have argued these two issues separately but, in the Commission's view, for the reasons set forth below, it is convenient to deal with them together.

With regard to the first of these issues, the Esketemc First Nation takes the position that the effect of the McKenna-McBride Agreement, the federal and provincial Orders in Council adopting that agreement, the *British Columbia Indian Lands Settlement Act*, the provincial *Indian Affairs Settlement Act*, and the Orders in Council adopting the recommendations of W.E. Ditchburn and J.W. Clark was to convey full authority upon the Royal Commission of 1912 to set apart reserves.(18) In the words of counsel, "the McKenna-McBride Commission had extensive power to allot new reserves and once it had allotted new reserves ... both the Federal and Provincial governments were formally bound to accept those new reserves unless there was a very good reason for their not doing so."(19) Counsel also relies on statements by Ditchburn, Deputy Superintendent General Duncan Scott, and Minister of the Interior and Superintendent General W.J. Roche, as well as judicial authority in *Jules v. Harper Ranch Ltd.*,(20) *Gosnell v. Minister of Lands*,(21) and *Roberts v. The Queen*,(22) in support of the conclusion that the Royal Commission of 1912 had authority to allot reserves, and that

> once the McKenna-McBride Commission had fixed and determined the lands which were to [be] constituted as reserves, those lands became reserves as defined in the *Indian Act of 1906*, and were something separate and distinct from other non-reserve lands in the Province of British Columbia. Those lands, for example, no longer fell within the purview of the *Land Act* of British Columbia and, thus, were not subject to pre-emption or other encroachment by third parties.(23)

For its part, Canada argues that, since the process for creating reserves has not been specified in the *Terms of Union*, the *Indian Act*, or the *Constitution Act, 1867*, reserves must be established as a matter of royal prerogative by means of instruments such as proclamations, writs, letters patent, orders in council, grants, or commissions.(24) In a case such as the present one in which the authority to legislate in relation to "Indians, and Lands reserved for the Indians" – which falls to Canada under section 91(24) of the *Constitution Act, 1867* – is divorced from the proprietary rights over Crown lands in British Columbia, which are held by the province, the royal prerogative must be exercised, according to counsel, by joint action between the two levels of government.[125] Canada could not act unilaterally to set apart reserves for the Alkali Lake Band because doing so would infringe upon the province's proprietary rights; rather, the appropriate procedure, in counsel's view, would have been for the province to appropriate the lands and transfer them to Canada, at which time Canada could have then set them apart as reserves, presumably by order in council, as was eventually done in this case in 1938.[126] Maintaining that the cases relied on by the First Nation in support of its position are distinguishable, Canada submits that the agreements and legislation establishing the McKenna-McBride Commission did not empower it to create reserves but merely to make recommendations subject to approval by the two governments.[127]

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(18) ICC Transcript, September 26, 2000, p. 29 (Stan Ashcroft).

(19) Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 19.

(20) *Jules v. Harper Ranch Ltd.*, [1989] 3 CNLR 67 (BCSC).

(21) *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912) (SCC).

(22) *Roberts v. The Queen* (unreported, FCA, October 12, 1999, Docket No. A-655-95), affirming *Wewaykum Indian Band v. Canada* (1995), 99 FTR 1 (FCTD), Teitelbaum J.

(23) Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 3.

(24) Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 33 and 35; ICC Transcript, September 26, 2000, p. 83 (Michael Mladen).

The First Nation replies that, if joint action was required to create reserves in British Columbia, the institution and operation of the McKenna-McBride Commission by agreement of the two governments, and featuring members appointed by each government, was sufficient to constitute such joint action.[128] Moreover, counsel adds that, if the allotment of reserve lands was a matter of royal prerogative as Canada suggests, the agreement, legislation, and Orders in Council served to regulate and confine the exercise of the prerogative in a manner that conferred the authority to set apart reserves on the McKenna-McBride Commission.[129]

With respect to the second of the foregoing issues, the First Nation argues in the alternative that, if IR 15, 17, and 18 were not lawfully set apart as reserves, they became *de facto* reserves as a result of the work of the McKenna-McBride Commission. Counsel relies specifically on *Canadian Pacific Ltd. v. Paul*,[130] *United States v. Walker River Irrigation District*,[131] *Lac La Ronge Indian Band v. Canada*,[132] and *Ross River Dena Band*

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[125] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 35.

[126] ICC Transcript, September 26, 2000, p. 73 (Michael Mladen).

[127] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 36–41.

[128] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 3.

[129] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 2; ICC Transcript, September 26, 2000, p. 160 (Stan Ashcroft).

[130] *Canadian Pacific Ltd. v. Paul*, [1988] 2 SCR 654.

[131] *United States v. Walker River Irrigation District*, 104 F. 2d 334 (9th Cir. 1939).

[132] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 (Sask. QB).

Council v. Canada.[353] In all these cases, according to counsel, the courts (or, in *Ross River*, one judge of the Yukon Territory Court of Appeal in dissent) were prepared to conclude that a reserve existed *in fact* although all the formalities of reserve creation had not been satisfied.[354] The First Nation contends that the McKenna-McBride Commission had delegated and statutory authority to create reserves, and that the federal Crown intended to create reserves and in particular to establish IR 15, 17, and 18 as reserves. It also argues that other indicia of reserve creation were present:

> (b) there was "consultation with the Indians" by the McKenna-McBride Commission;
> (c) there was a clear demarcation of the lands by surveyor Ashdown Green;
> (d) there was a "manifestation by the Crown that the lands will constitute an Indian Reserve" by the McKenna-McBride Commission designating and numbering I.R.s 15, 17 and 18 as such; [and]
> (e) the Crown treated I.R.s 15, 17 and 18 as reserve:
>   (i) by an absence of protest on the part of the federal Crown;
>   (ii) by not only allowing but requiring the children who resided on those reserves to attend residential school;
>   (iii) by having the Indian police keep away non-aboriginals;
>   (iv) in not telling the Esketemc people that all of I.R.s 15, 17 and part of 18 had been cut off or "disallowed";
>   (v) by continuing to allow a large proportion of the Esketemc population to continue to reside on I.R. 15, 17 and 18;
>   (vi) by giving rations to elders living on those reserves; [and]
>   (vii) in only telling the Esketemc people to leave when the school was established at Alkali Lake in 1958 or 1959.[355]

Canada acknowledges that, where there is a deliberate decision by the Crown to establish a reserve, lands *may* attain reserve status if they are occupied or used by members of a band as a reserve. However, it concedes this point subject to a couple of critical provisos: first, when a province has proprietary jurisdiction over the lands in question, the decision to establish even a *de facto* reserve must be made jointly by the federal and provincial governments; and, second in this case, the federal Crown initially decided to *restrict* the mandate of the McKenna-McBride Commission by requiring that its decisions be subject to approval by both levels of government, and subsequently decided to *disallow* that Commission's recommendations regarding IR 15, 17, and 18.[156]

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[353] *Ross River Dena Band Council v. Canada*, [2000] 2 CNLR 293 (YTCA).
[354] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, pp. 24-26.
[355] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 27.

Requirements of Reserve Creation

In the Commission's view, a particular parcel of land is either a reserve or it is not, and designations of reserve land as *de facto* or *de jure* simply represent points on the continuum of reserve creation. If the *required* elements of reserve creation are in place, a reserve will exist whether all the formalities of establishing legal title have been completed. Just as in an ordinary conveyance of real estate, the creation of a reserve must progress through a number of steps and satisfy a number of criteria. In conventional real estate, a purchaser first obtains an equitable interest in the land being acquired which later, upon registration in the appropriate registry office, becomes legal title. By way of contrast, a First Nation never obtains anything more than an equitable interest because legal title is never registered in its name but rather in the name of the federal government for the First Nation's benefit. Nevertheless, it is this registration in the name of the federal government that is the closest equivalent to legal title for a First Nation in the *sui generis* regime of Indian reserve creation. Once such registration has been completed, a reserve achieves *de jure* status, but until that time a reserve is nothing more than *de facto*. It is important to recognize, however, that a *de facto* reserve is just as much a reserve as one for which legal title has been fully conveyed to the federal government. Perhaps there are differences in terms of the greater difficulty in proving the existence of a reserve before registration and the greater risk of defeasibility faced by a *de facto* reserve pending registration, but a *de facto* reserve is still a reserve, nothing more nor less.

What, then, are the minimum required elements of reserve creation? The Esketemc people begin with the proposition that no formality is required to create a reserve. In *Ross River*, Finch JA in dissent agreed, stating that

> the two conditions necessary and sufficient for the creation of a reserve are an intention to create a *de facto* reserve, and an act by a public official with authority to act, that gives effect to the intention. While Orders-in-Council have frequently been used for the latter purpose, it is clear that Indian reserves have been and can be created in their absence.[157]

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[156] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 45–46.

[157] *Ross River Dena Council Band v. Canada*, [2000] 2 CNLR 293 at 312 (YTCA), Finch JA dissenting.

As in the present inquiry, the Crown in *Ross River* argued that reserves could be created only through the exercise of the royal prerogative properly delegated to the public servants purporting to exercise that authority. Finch JA found that the prerogative power to create reserves in the northern territories had been displaced by a statutory regime that did not limit "the ability of the Crown to create reserves by the exercise of any particular power, or by the actions of any particular government body." Adopting the words of the chambers judge, he concluded that sufficient powers to create reserves had been delegated to A.D. Hunt, Chief of the Resources Division, Northern Administration Branch, Department of Northern Affairs and National Resources, that Hunt had intended to create a reserve, and that his actions had in turn been sufficient to do so:

> The area reserved on January 26, 1965 was a tract of land that was (and is) vested in her Majesty. It had been applied for, for the use and benefit of a band, the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the *Indian Act* definition of "reserve".[158]

Although Finch JA commented that Richard and Hudson JJA differed from him on whether a reserve could only be created by the exercise of the royal prerogative, the majority reasons turn more on the existence of authority and intention than on whether Hunt's actions constituted a formal exercise of that prerogative. Richard JA found no evidence regarding Hunt's authority to create a reserve or to support the conclusion that his actions represented those of the Governor in Council. On the question of intention, Richard JA found "a deliberate decision *not* to create a Reserve."[159] He paid particular attention to the terms of the Umbrella Final Agreement between the Council for Yukon Indians and the governments of Canada and Yukon, which distinguished between "reserves" and "lands set aside," and a statement by the Department of Indian Affairs and Northern Development that its policy was "not to extend the Indian Reserve system to the Yukon and Northwest Territories."[160] The fact that the lands were reserved for the *Indian Affairs Branch* rather than, as required by the definition of "reserve," for the use and benefit of a *band* was not "mere semantics, nor form vs. substance, in the context of the then existing distinction between Lands Set Aside and Reserves."[441] Hudson JA concurred with Richard JA, adding:

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[158] *Ross River Dena Council Band v. Canada*, [2000] 2 CNLR 293 at 316 (YTCA), Finch JA dissenting.
[159] *Ross River Dena Council Band v. Canada*, [2000] 2 CNLR 293 at 321 (YTCA), Richard JA.
[160] *Ross River Dena Council Band v. Canada*, [2000] 2 CNLR 293 at 321–22 (YTCA), Richard JA.

> It is my finding that to find that persons being mere agents of Her Majesty had the power to declare the creation of a reserve pursuant to the *Indian Act* in the absence of evidence of the delegation of such power is a mistake in law....
>
> Overriding the examination of the evidence it is common ground that the words of the *Indian Act* involve a lacuna with respect to the basis upon which a reserve should be created and the mechanics of such creation. That alone should be a reason why the court should not declare the existence of a reserve pursuant to the *Indian Act*, but that the lacuna should be resolved by legislative means or by the exercise of the Crown prerogative.[442]

It is important to recognize that the *Ross River* case is currently under appeal, so the majority decision may not represent the final word on the requirements to create a reserve.

In arriving at his conclusion that no formality is required in reserve creation, Finch JA relied on *Ontario Mining Company v. Seybold*[443] and the *Paul* case, as well as an article entitled "The Establishment of Indian Reserves on the Prairies" by Richard Bartlett.[444] In *Seybold*, Canada set aside certain lands in Ontario as reserves for the Indians, but the selection was not confirmed by order in council. It was later determined that the province owned the lands in question, although, as Finch JA commented,

> all courts which considered the case, including the High Court of Ontario, the Ontario District Court, the Supreme Court of Canada and the Privy Council, assumed that the selection of lands by Dominion Government officials, after consultation with the Indians, would have been effective to establish a reserve had it not been for the proprietary interest of the Province. *In other words, the de facto creation of a reserve would have been sufficient notwithstanding the absence of an Order-in-Council or other official instrument.*[445]

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[441] *Ross River Dena Council Band v. Canada*, [2000] 2 CNLR 293 at 324 (YTCA), Richard JA.

[442] *Ross River Dena Council Band v. Canada*, [2000] 2 CNLR 293 at 329-30 (YTCA), Hudson JA.

[443] *Ontario Mining Company v. Seybold*, [1903] AC 73.

[444] Richard Bartlett, "The Establishment of Indian Reserves on the Prairies," [1980] 3 CNLR 3.

[445] *Ross River Dena Band Council v. Canada*, [2000] 2 CNLR 293 at 311 (YTCA), Finch JA dissenting. Emphasis added.

Similarly, in discussing the creation of reserves under the numbered treaties, Bartlett wrote:

> "Setting apart" is suggested to consist of the survey and selection of the lands, following such consultation with the Indians as is required by treaty. The obtaining of provincial concurrence pursuant to the Natural Resources Transfer Agreement is also, of course, required in the establishment of reserves after 1930. The treaty language, negotiations, and department practice and usage all demand such a conclusion. It recognizes the judicial concern with the *de facto* setting apart of land. As Mr. Justice Clarke declared in the United States Supreme Court:
>
> > *[T]o hold that*, for want of a formal approval by the Secretary of the Interior, *all of the conduct of the Government and of the Indians in making and ratifying and in good faith carrying out the agreement between them ... is without effect, would be to subordinate the realities of the situation to mere form.*"[146]

What we take from these authorities is that reserves *can* be created in the absence of formalities, but that, in circumstances in which the proprietary interest in lands to be set apart as reserves resides with the province, provincial concurrence is required to establish the reserve.

In *Paul*, the Canadian Pacific Railway (CPR) sought to enjoin the Woodstock Indian Band from blockading the railway's right of way across the band's reserve. The Band defended on the basis that the right of way lands were reserve lands held by Canada for the Band's use and benefit, that those lands had never been surrendered by the Band, and that the railway was trespassing on them. The evidence disclosed that the right of way had originally formed part of a larger reserve acquired by the government of New Brunswick in 1851 "for public uses: that is to say, for the use of the Melicette Tribe of Indians." Under its constating legislation in 1864, the Woodstock Railway Company – Canadian Pacific's predecessor in interest – was granted the right, with the Crown's permission, to take and hold as much Crown land as it required to lay out, construct, and operate its line. A March 7, 1866, undertaking by the company to construct the railway on lands that included the disputed reserve lands was approved by the New Brunswick government. Although the legislation stipulated no special form for such approval, the Supreme Court of Canada unanimously concluded that New Brunswick had authorized a proprietary interest in the nature of a statutory right of way or easement. As to the interest of the Band in the disputed lands, Dickson J at trial found that, "[w]hile there is no evidence of any formal allotment of the lands, it appears clear that the lands so acquired were de facto on acquisition allotted to the Meductic Melicette Tribe, whose members were the ancestors of those Indians now constituting what is known as the Woodstock Band."[67] On the same point, the Supreme Court of Canada remarked:

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[146] Richard Bartlett, "The Establishment of Indian Reserves on the Prairies," [1980] 3 CNLR 3 at 49-50, quoting from *Northern Pacific Railway v. Wismer*, 246 US 283 at 288-89 (1918). Emphasis added.

> It is clear that by virtue of the 1851 deed the land in question was vested in the Crown. Shortly thereafter it became an Indian reserve. The trial judge placed some importance on the fact that there was no formal allocation of the land as a reserve prior to Confederation. *It seems to us, however, to be somewhat inconsistent to demand such formality for allocation as a reserve while at the same time accepting the lack of a "formal grant" of land to the Woodstock Railway Company.* We are of the view that it can be accepted that the land in question was part of the Woodstock reserve before Confederation.[68]

The Court concluded, however, that, because Canadian Pacific had a valid easement or right of way over the disputed lands that was "sufficient to support the award of a permanent injunction," it was unnecessary to determine whether the acquisition of that easement or right of way had the effect of extinguishing the Band's interest in the underlying fee simple interest of the Crown.

Counsel for Canada in the present inquiry suggests that "the genesis of the *de facto* reasoning was to put the Band on the same footing as the CPR in terms of formal proof of its claim," and that "[t]o do otherwise would have been manifestly unfair to the Band."[69] Although counsel also characterizes the 1851 deed by which the lands were transferred to the colony of New Brunswick for the benefit of the Indians as an exercise of the royal prerogative, such a conclusion does not appear to cast doubt on the fact that a reserve was created with little or no formality. The nature of the Crown's actions as an exercise of the royal prerogative – or as something else – does not appear to have been argued forcefully in that case because the real point of contention was not whether a reserve had been *created* but whether it *continued to exist* following the grant of the right of way or easement.

Similarly, in the *Walker River Irrigation District* case, the issue was not whether a reserve had been created but whether, *in the absence of an*

[67] *Canadian Pacific Ltd v. Paul* (1981), 34 NBR (2d) 382 at 387 (NBQB), Dickson J.
[68] *Canadian Pacific Ltd v. Paul*, [1988] 2 SCR 654 at 675 (*per curiam*). Emphasis added.
[69] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 42.

express statement of intention, the waters of a stream that flowed through a reserve had implicitly been included as an incident of the reserve to the extent necessary to irrigate reserve lands. The court held that formalities were not required to establish that intention:

> In the Winters case [150], as in this, the basic question for determination was one of intent – whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were to be reserved. We see *no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent.* While in the Winters case the court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved.[151]

Gerein J reached a similar conclusion in *Lac La Ronge Indian Band v. Canada*, where he held that the question of whether a reserve has been created turns on the facts of each particular case:

> From my review I hold the view that *there is no specific procedure or single process which alone can create an Indian Reserve.* Rather, the components of the process may well vary from time to time, but in each instance the result will be the same. *The one constant is that the Crown must intend to create an Indian Reserve and take steps to carry out that intention.* Included in the latter will always be a demarcation of the land and almost invariably consultation in advance with the Indians about the location of the land. Thus, the question of whether a reserve was created is a factual one and in each case one must look to the prevailing circumstances to find the answer.

After considering the specific terms of Treaty 6 regarding reserve creation, Gerein J continued:

> There clearly was a commitment to lay aside Reserves. There equally was a commitment that a person would be designated to carry out the task and that there would be consultation. However, much was left unsaid which brought about an undefined and flexible process.
>
> Nothing was said about how the suitable person would be selected or how that person would carry out the work. *It is not stated whether the suitable person, once appointed, would enjoy absolute authority or would be required to obtain*

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[150] *Winters v. United States*, 207 US 564, 28 S Ct 207, 52 L Ed 340 (9th Cir. 1908).

[151] *United States v. Walker River Irrigation District*, 104 F. 2d 334 at 336 (9th Cir. 1939). Emphasis added.

[152] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 328–29 (Sask. QB). Emphasis added.

> *approval for the actual setting apart of a Reserve. In fact, I believe either could occur.* While there was to be consultation, which undoubtedly was to be in good faith, that consultation was to relate to locality and not to specific lands. In practise it did frequently deal with the latter, but the Indians did not have an absolute right to select a particular tract of land. What the treaty did was to create a basic approach within which it was left to the parties to work out what was required to achieve a mutually satisfactory result....
>
> In the end only two things mattered. The first was that Reserves be set apart. The second was that there be an intention that the land set apart be constituted a Reserve. How that result was achieved is of secondary importance.[153]

Gerein J then embarked on a review of case authority from which he derived the following principles:

- In *St. Catherines Milling and Lumber Company v. The Queen*,[154] Henry J found no need to define the process by which a reserve is established, but he did clearly state that there must be a positive act to establish a reserve.[155]
- In the context of legislation forbidding the grant of a lease on lands comprising an Indian reserve or settlement, Macdonald CJA of the British Columbia Court of Appeal in *Esquimalt and Nanaimo Railway Co. v. McLellan*[156] reasoned that saying lands are *available* for Indian reserves does not *make* them Indian reserves. From this statement Gerein J concluded that "there must be some manifestation of an intention to create an Indian reserve."[157]
- Gerein J quoted the *Paul* case as authority for the proposition that no formality was essential to the creation of a reserve.[158]
- *R. v. Nikal*[159] highlights the importance of the terms of reference given to Crown agents involved in identifying Indian reserves. In that case, instructions had been given to Commissioner Peter O'Reilly "to ascertain what fishing grounds should be reserved *in order that application might be made* to the Department of Marine and Fisheries to have those areas

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[153] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 329 and 331 (Sask. QB). Emphasis added.
[154] *St. Catherines Milling and Lumber Company v. The Queen* (1887), 13 SCR 577, Henry J.
[155] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 332 (Sask. QB).
[156] *Esquimalt and Nanaimo Railway Co. v. McLellan*, [1918] 3 WWR 645 (BCCA).
[157] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 333 (Sask. QB).
[158] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 334 (Sask. QB).
[159] *R. v. Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658, [1996] 5 WWR 305, 19 BCLR (3d) 201, [1996] 3 CNLR 178, 105 CCC (3d) 481.

secured for the use of the Indians." In the view of Cory J. this wording disclosed that O'Reilly's authority was limited to making recommendations and did not extend to allotting exclusive fisheries.[160]

- In *Northern Pacific Railway Company v. Wismer*,[161] a government agent entered into a treaty with the members of the Spokane Tribe in 1877 by which their aboriginal title was extinguished and certain lands were designated as their reserve. The lands were not formally set aside as a reserve by executive order until 1881, but in the meantime the railway company had filed a plat with regard to some of the lands, the effect of which, under the relevant legislation, would have been to vest the affected lands in the company. The court found that the government agent had been authorized to negotiate the treaty, and that his actions had been approved by no later than 1878. In the result, the executive order of 1881 was not considered necessary to create the reserve, but simply gave formal sanction to the earlier creation of the reserve.[162]
- As to how the government's intention to create a reserve might be proven, the court in *Sac and Fox Tribe of the Mississippi in Iowa and United States v. Licklider*[163] concluded that certain lands comprised a *de facto* reserve and that no formal act was required to set them apart. In reaching this decision, the court had regard for the actions of the band and the government: the band had occupied the land for many years, and the government had treated the lands as a reserve, its intent manifested by sending an agent to reside on the reserve, by making annuity payments there, and by constructing a boarding school on it.[164]

Based on these authorities, Gerein J concluded as follows:

> There is no single method to create a Reserve. However, there are certain things which are essential [under Treaty 6]. The Crown must make a deliberate decision to establish a Reserve; there must be consultation with the Indians, there must be a clear demarcation of the lands, and there must be some manifestation by the Crown that the lands will constitute an Indian Reserve.
>
> The position of the plaintiffs is that if there is consultation and demarcation, whether by survey or reference to the township plan, then a Reserve comes into

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[160] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 334 (Sask. QB).
[161] *Northern Pacific Railway Company v. Wismer*, 246 US 283 (1918).
[162] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 336 (Sask. QB).
[163] *Sac and Fox Tribe of the Mississippi in Iowa and United States v. Licklider*, 576 F. 2d 145 (8th Cir. 1978).
[164] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 336-37 (Sask. QB).

> existence. In my opinion, that approach is too broad and simplistic. There were times when this happened and a Reserve did result. There were instances when the surveyor was instructed to create the Reserve. No further approval was needed. There were other instances when the instructions were not all inclusive and the Crown did not expressly give its approval, but by its silence and subsequent attitude the Crown manifested its acquiescence in the land being constituted a Reserve. Then there were other instances when the instructions clearly limited the authority. In such a case a survey in itself was not sufficient.
>
> It is my conclusion that the land was not "set apart" until the Crown treated it as such. That could happen in more than one way, including an absence of protest.
>
> As best I can make out, on the prairies all of the Reserves are the subject of an Order-in-Council. However, I do not consider such Orders to be an essential part of the process of establishing a Reserve. There are many instances, including several involving the Lac La Ronge Indian Band, where Reserves were marked out, accepted as such by the Crown, and only many years later confirmed by Orders-in-Council. However, in the interim they were viewed by all as Reserves and accordingly were validly constituted Reserves. The Orders-in-Council were no more than an administrative act which confirmed or clarified what already was a reality."[165]

With particular reference to certain lands referred to in that case as the Candle Lake lands, Gerein J applied the foregoing principles in the following manner:

> No Indian Reserve was created at Candle Lake. The Dominion Government was interested in creating a Reserve; it took steps to create a Reserve; it intended to create a Reserve; it made a tentative decision to create a Reserve; but it did not create a Reserve. At the very end it abandoned the project....
>
> Following the execution of the Treaty, it was the Dominion of Canada which owned all the land. That being so, it is only reasonable that land could not be alienated without its approval and concurrence. *In respect to Indian Reserves it fell to the Chief Superintendent to initiate the process of establishing Reserves by deputing a suitable person. However, it was also his role to decide what authority would be conferred upon his deputy. Thus, the Chief Superintendent could authorize his deputy to actually create a Reserve or he could retain the final decision unto himself. The act of deputation does not of necessity entail a complete abdication of authority. In the historical record there are examples of both approaches. The Treaty itself does not mandate one approach or the other.*
>
> It is useful to look at what transpired when several small Reserves were created for the Lac La Ronge Indian Band in 1909.... First, there was an urgency about the matter because non-Indians were entering the area. Secondly, the Department indicated the locations and this amounted to some restriction on the authority of the surveyor. Thirdly, the letter [of instruction to surveyor J. Lestock Reid] expressly

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[165] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 337–38 (Sask QB).

> directed the surveyor to decide on a location, complete a survey and then proclaim the subject lands to be an Indian Reserve. Once that was done, the Department viewed the process as complete. In that instance, authority to actually create the Reserve was expressly conferred upon Mr. Reid....
>
> Let us contrast that with what happened in respect to the Candle Lake lands.... In the case of the Candle Lake lands the Dominion Government, acting through the Department of Indian Affairs, involved itself directly in the creation of an Indian Reserve. It held unto itself the ultimate authority to establish the Reserve. Until the Department made an unequivocal decision to designate certain lands as an Indian Reserve and then took steps to implement the decision, the intended Reserve could not come into existence. It fell to the Department alone to proclaim the creation of an Indian Reserve at Candle Lake and it failed to do so. It's [sic] intention in itself was not sufficient. As the process had not passed beyond that, no Reserve was created.[406]

Justice Gerein's decision was appealed to the Saskatchewan Court of Appeal and, although reversed on other grounds, his conclusions regarding the requirements for reserve creation were upheld. Speaking for a unanimous court, Vancise JA agreed with the trial judge's finding that no land had been set apart as a reserve in that case:

> For an Indian reserve to be created there must be a clear intention on the part of the Crown to set apart a defined tract of land as an Indian reserve. The Crown must carry out this intention by, for example a positive act of an official properly "deputed" or authorized to carry out the intention.[407]

The Lac La Ronge Indian Band had previously registered caveats against the Candle Lake lands, claiming "a usufructuary and possessory right to lands set apart by Her Majesty for the use and enjoyment" of the Band. In *Lac La Ronge Indian Band v. Beckman*,[408] the Band applied to determine whether it possessed an interest in those lands, claiming that a reserve had been set apart and, in the alternative, that the lands constituted a *de facto* reserve. Matheson J concluded that a reserve had not been established because neither Inspector of Indian Agencies William Murison nor his superiors believed he had been deputized with the requisite authority to create a reserve, there had never been a survey of the lands allegedly "selected" by Murison, and there had never been a confirming order in council. As to whether the Candle Lake lands comprised a *de facto* reserve, Matheson J stated:

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[406] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 358-60 and 365 (Sask. QB). Emphasis added.
[407] *Venne v. Canada*, [2001] SKCA 109 at 63-64 (Sask. CA).
[408] *Lac La Ronge Indian Band v. Beckman*, [1990] 3 WWR 1 (Sask. QB).

> If this dispute over the Candle Lake lands was between the province and Canada, an argument by Canada that an Indian reserve existed, in fact, might receive serious consideration if the evidence justified a conclusion of a de facto reservation. But Canada does not take that position, quite properly, because there is no evidence to support it. The Candle Lake lands were never occupied, nor used, by any members of the Lac La Ronge Band as a reserve, and the lands were never considered by Canada whose responsibility it was to establish Indian reserves, as a reservation.[109]

What we take from this decision is that, on the evidence before him, Matheson J did not find the requisite intent to create a reserve on the part of either Canada or the Band, and therefore no *de facto* reserve came into being.

From the foregoing, we conclude that reserve creation requires no formalities, but it will always require an *intention* to create a reserve, and an act by a public official with *authority* to act that gives effect to the intention. Whether the requisite intention and authority exist are questions of fact that can be established by various kinds of evidence, including formal documents such as orders in council, less formal documents such as letters of instruction, and even the actions of the Crown's agents and the Indians. Depending on the instructions given to the Crown's agent, the authority to set apart reserves may be delegated to the agent absolutely, or the Crown may retain the authority to do so. An additional layer to the question of authority exists where the proprietary jurisdiction in the lands to be reserved is held by the province, in which case the provincial government must concur in the decision to set the lands apart.

With these principles in mind we must now consider the instructions given to the McKenna-McBride Commission to determine whether it was delegated absolute authority to set apart reserves or merely the power to consider the question of reserves and to make recommendations. In reviewing those instructions, we must first have before us the relevant principles of interpretation to be applied.

Principles of Interpretation

There is no doubt that, in establishing and acting through the vehicle of the McKenna-McBride Commission, the federal and provincial governments were, to use the words of Gerein J in *Lac La Ronge Indian Band v. Canada*, interested in creating reserves and took steps to create reserves. But did they actually create reserves?

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[109] *Lac La Ronge Indian Band v. Beckman*, [1990] 3 WWR 1 at 33 (Sask. QB).

The general intention to create reserves was unquestionably present. The whole purpose of the Royal Commission was to identify reserve lands for British Columbia's Indians and settle an issue that had been outstanding for many years, and in the case of the Alkali Lake Band it specifically identified IR 15, 17, and 18 as lands which, in its opinion, should be added to the Band's reserve land base. The real question in the present inquiry is whether the two governments vested in the Royal Commission, acting alone, the *authority* to create reserves. As Gerein J commented, there is no single method by which reserves have been created; in some cases, the surveyor or other government agent was given the authority to create reserves on the spot without further approval, while in others "the instructions clearly limited the authority." In the words of Finch JA in *Ross River*, did a decision of the McKenna-McBride Commission represent "an act by a public official with authority to act, that gives effect to the intention"?

To answer this question, it is essential to have careful regard for the terms of the McKenna-McBride Agreement of September 24, 1912, the legislation and Orders in Council giving rise to that agreement, and the subsequent statutes and executive acts by which that agreement was implemented. In considering these instruments, it is important to keep in mind the relevant principles of interpretation that guide us in establishing the meaning of documents affecting Indians. Cases dealing with *treaty* interpretation instruct us to apply three principles: first, to interpret treaty terms liberally; second, to resolve ambiguities in favour of the Indians; and, third, to have regard to extrinsic evidence. In applying these liberal principles, however, it is important to remember the caution expressed by Lamer J in *R. v. Sioui*:

> Even a generous interpretation of the document ... must be realistic and reflect the intention of both parties, not just that of the Hurons. *The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.*[170]

Similar cautions were expressed by the Nova Scotia Court of Appeal in *Marshall*:

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[170] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069. Emphasis added.

> Lamer J. confirms that the goal is to deduce the common intention of the parties by interpreting the treaties in their historical context....
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> In ascertaining the common intention the court must take into consideration the context in which treaties were negotiated and committed to writing, including the limitations of the parties. *The resulting interpretation must, however, be a realistic one.*[71]

On the appeal to the Supreme Court of Canada, Binnie J in *Marshall* clearly advocated a reasonable approach to interpretation:

> "Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui, supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Sundown*, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (emphasis added) (*Sioui, per* Lamer J., at p. 1069). In *Taylor and Williams, supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236). The historical record in the present case is admittedly less clear-cut, and there is no parallel concession by the Crown.[72]

Moreover, because we are dealing with a federal-provincial agreement and Orders in Council issued by each level of government, which are, in our view, more akin to statutes than to treaties in the sense that the Indians were not party to them, it is also important to have regard for the principles of interpretation relating to statutes affecting Indian interests. *Nowegijick v. The Queen* instructs us to apply a similar approach to that used for interpreting treaties, meaning that statutory terms "should be liberally construed and doubtful expressions resolved in favour of the Indians."[73] Counsel for the First Nation relies on *Mitchell v. Peguis Indian Band* in support of the further principle that provisions aimed at maintaining Indian rights are to be interpreted broadly, whereas provisions that would limit or abrogate Indian rights should be construed narrowly.[174] Similarly, counsel advances *Osoyoos Indian Band v. Town of Oliver* as authority for the "minimal impairment" principle – that is, "[t]he fiduciary duty of the Crown requires that Indian rights and benefits be interpreted so as to impair such rights to the least extent possible";[175] in short, according to counsel, because the Crown has a fiduciary obligation to minimally impair Indian interests, "(1) where two interpretations can be reasonably sustained, the one which impairs Indian interests the least is to be preferred; and (2) any ambiguous words must be interpreted in a way favourable to Indian interests."[176]

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[71] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 265-66 (NSCA). Emphasis added.
[72] *R. v. Marshall*, [1999] 3 SCR 456 at 474, Binnie J.
[73] *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36, Dickson J.

Although the Commission does not disagree with the foregoing principles of law cited by counsel for the First Nation, we believe it is also important to have regard for further comments by La Forest J in *Mitchell*, which provide additional context to the passage quoted by counsel. Specifically, La Forest J differentiated between the principles involved in the construction of statutes and those relating to the interpretation of treaties:

> I note at the outset that I do not take issue with the principle [in *Nowegijick* and other cases] that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.
>
> But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions

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[174] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 143, La Forest J.

[175] *Osoyoos Indian Band v. Town of Oliver* (1999), 172 DLR (4th) 589 (BCCA).

[176] Written Submission on Behalf of the Esketemc First Nation, July 28, 2000, pp. 31–32.

> aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown; see *United States v. Powers*, 305 U.S. 527 (1939), at p. 533.
>
> *At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.*[67]

As the Commission commented in its report on the 1958 enfranchisement claim of the Friends of the Michel Society:

> Thus, the principle is not simply that any construction favouring the Indians ought to be accepted, because we still, of course, demand fidelity to the language and purpose of the statute. Statutes relating to Indians should be construed liberally, having regard for parliamentary intent as embodied in the text …
>
> In [*R. v.*] *Lewis*, the Supreme Court of Canada summarized the canons of interpretation of statutes relating to Indians, beginning with *Nowegijick* and *Mitchell*. The issue in *Lewis* was whether a band's power under the *Indian Act* to make by-laws for the management of fish "on the reserve" extended to a river immediately adjacent to the reserve. Iacobucci J, for the Court, approached the task by analyzing the wording, context, and purpose of the statutory provision. Making the point that these three elements must be reconciled, he rejected the argument that a broad, purposive construction of the phrase "on the reserve" was justified because the fishery is critical to the economic and cultural well-being of aboriginal people, and the general goal of the *Indian Act* is to protect the "sustaining practices" of aboriginal people. Iacobucci J stated that, although the suggested interpretation "goes further towards achieving Parliament's objective of protecting and maintaining Indian rights, it is not an interpretation supported on the language or goal of the section."[68]
>
> In summary, then, while statutes dealing with Indians must be liberally construed, an interpretation that furthers the protection of Indian rights can be accepted only if the language and purpose of the statutory provision can support such an interpretation.[69]

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[67] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 142-43, La Forest J.

[68] *R. v. Lewis*, [1996] 1 SCR 921 at 958.

[69] ICC, *Friends of the Michel Society Inquiry: 1958 Enfranchisement Claim* (Ottawa, March 1998), reported (1998) 10 ICCP 69 at 93-94.

Application

The McKenna-McBride Commission's Terms of Reference

With these principles in mind, we turn to the relevant instruments in the present case. The primary terms of reference for setting apart Indian reserves in British Columbia are contained in the infamous and – given the checkered history of reserve selection in the province before 1871 – ambiguous Article 13 of the *Terms of Union*, which provides:

> **13.** The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and *a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union*.
>
> To carry out such policy, *tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate* for the purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[180]

When the McKenna-McBride Commission was established, the 1906 *Indian Act* was in force. Section 2(i) of that statute states:

> **2.** In this Act, unless the context otherwise requires ...
>
> (*i*) "reserve" means any tract or tracts of land set apart by treaty or otherwise for the benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown ...[181]

By 1912, Canada and British Columbia had already been sparring over the implications of the *Terms of Union* and their respective rights and obligations under that vague constitutional document for over 40 years. The Joint Reserve Commission and the subsequent sole Commissioners Sproat, O'Reilly, and Vowell represented the first attempt to resolve the matter, but after 30 years their labours, while considerable, had proven inconclusive. The purpose of the McKenna-McBride Agreement was to achieve a negotiated settlement of the uncertainty created by the *Terms of Union* to avoid having the matter determined by the courts, as the Laurier government had proposed to do prior to its defeat in 1911. Given that the two governments sought to avoid having a decision imposed on them by an independent third party, it seems safe to assume that a reference to the Secretary of State for the Colonies, as contemplated by Article 13 of the *Terms of Union*, was not considered to represent a more attractive alternative.

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[180] British Columbia, *British North America Act, 1867, Terms of Union with Canada, Rules and Orders of the Legislative Assembly* (Victoria: R. Wolfenden, 1881) (ICC Documents, p. 8). Emphasis added.

[181] *Indian Act*, RSC 1906, c. 81, s. 2(i).

The key terms of the McKenna-McBride Agreement of September 24, 1912, are the following:

> Whereas it is desirable *to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia*, therefore the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals *as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia* –
>
> ...
>
> 2. *The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner*
>
> (b) *At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians*. And they may set aside land for any Band of Indians for whom land has not already been reserved.
>
> 3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.
>
> ...
>
> 7. The lands comprised in the Reserves *as finally fixed by the Commissioners* aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians ...[682]

Standing alone, these provisions would seem to have vested considerable power in the McKenna-McBride Commission to fix the size and location of reserves for bands in British Columbia. As the recitals contemplated, however, this agreement itself was subject to the approval of the federal and provincial governments.

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[682] Memorandum of an Agreement arrived at between J.A.J. McKenna, Special Commissioner appointed by the Dominion Government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, as Premier of the Province of British Columbia, September 24, 1912 (ICC Documents, pp. 238-45). Emphasis added.

This approval was forthcoming under federal Order in Council PC 3277 of November 27, 1912, which made it clear that the Committee of the Privy Council considered itself bound, under the *Inquiries Act* of 1906, to constitute the McKenna-McBride Commission in such a way that its proceedings would in turn be "subject to approval." We have reviewed that legislation and find that it authorized the Governor in Council to "cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof." To that end, the Governor in Council was further authorized to appoint commissioners with the power to summon and compel the attendance of witnesses to give evidence on oath or solemn affirmation, either orally or in writing, and to produce documents as required by the commissioners to permit "the full investigation of the matters into which they are appointed to examine."[183] The *Inquiries Act* did *not* confer power on the commissioners appointed under its terms to make decisions but only to conduct investigations. Accordingly, Order in Council PC 3277 continued:

> the approval of the agreement should be subject to a further provision which should be accepted by the Government of British Columbia before the agreement can become effective providing that *notwithstanding anything in the agreement contained*[,] *the acts and proceedings of the Commission shall be subject to the approval of the two Governments*, and that the Governments agree to consider favourably the reports, whether final or interim, of the Commission with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the agreement in accordance with its true intent and purpose.[184]

Provincial Order in Council 1341 of December 31, 1912, made no mention of the federal *Inquiries Act* but nevertheless adopted word for word the foregoing language requiring the approval of the two governments.[185]

The First Nation further refers us to federal Order in Council PC 1401, passed on June 10, 1913, in response to the McKenna-McBride Commission's resolution of May 20, 1913, seeking authorization to receive representations from the Indians and report on "matters and questions extraneous to the agreement" of September 24, 1912. Counsel contends that this Order in Council demonstrates the considerable power and authority of the McKenna-McBride Commission. The Order in Council stated:

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[183] *Inquiries Act*, RSC 1906, c. 104, ss. 2, 4, and 5.
[184] Order in Council PC 3277 (Canada), November 27, 1912 (ICC Documents, pp. 249–50). Emphasis added.
[185] Order in Council 1341 (British Columbia), December 31, 1912 (ICC Documents, pp. 254–55).

> The Minister observes that it is clear that the agreement between the representatives of the Province of British Columbia and the Dominion does not contemplate an investigation and settlement of matters appertaining to general Indian policy in British Columbia. It is confined to matters affecting Indian lands which require adjustment between the parties.
>
> The Minister is of the opinion that it would be inadvisable to burden the Commission with the investigation of all matters that might be brought to their attention by Indians, many of which would be of slight importance not affecting the relations of the two Governments. Unless great care were taken misconception might arise in the minds of the Indians as to the action of the Commission if authorized to make a general investigation, *the Commission having power to deal finally with all matters mentioned in the agreement subject to the approval of the two Governments*, but having only instructions to report and make suggestions as to other matters.[86]

In our view, although the Order in Council provides that the McKenna-McBride Commission had "*power to deal finally* with all matters mentioned in the agreement," we find in the immediately following words of the sentence – "subject to the approval of the two Governments" – an express limitation on the powers of the Commission by making its decisions subject to approval of the two governments. We conclude on a *prima facie* basis that the clear wording of the Orders in Council, even liberally construed, does not support an interpretation that would convey to the Royal Commission anything more than the authority to make recommendations based on its investigations.

Case Authorities

We find support for this conclusion in the decision of the Federal Court of Appeal in *Roberts v. Canada*.[87] At trial, on the question of the legal effect of the McKenna-McBride Agreement, Teitelbaum J had stated:

> The [McKenna-McBride] Agreement, and in this regard I agree with Cumming, J., in *Dunstan v. Hell's Gate* [*Enterprises*[88]], on its face did nothing dispositive of land

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[86] Order in Council PC 1401 (Canada), June 10, 1913 (ICC Documents, pp. 260–61). Emphasis added.
[87] *Roberts v. Canada*, [2000] 3 CNLR 303 (FCA).
[88] *Dunstan v. Hell's Gate Enterprises*, [1986] 3 CNLR 47, 22 DLR (4th) 568 (BCSC).

rights, it merely agreed that a commission should be set up to make recommendations in that regard.[159]

On the appeal, McDonald JA (Linden JA concurring) stated:

> In 1912, the Federal and B.C. governments established the McKenna-McBride Commission (the "Commission") to resolve all of the outstanding issues related to reserve lands in the province. Under the terms of a 1913 Order-in-Council, the McKenna-McBride Commission was to review all reserve lands in British Columbia and to fix and confirm the size and allocation of these reserves. *All decisions of the Commission were subject to governmental approval.*[160]

Counsel for the Esketemc First Nation highlights a different excerpt from this case as demonstrating Justice McDonald's view that, although the McKenna-McBride Commission could not determine which of two competing bands would be the ultimate recipient of disputed reserve lands, it *could* "fix and determine the lands which were to be constituted reserves and conveyed by British Columbia to Canada for this purpose."[161] Counsel further submits that "[t]here is no doubt that the McKenna-McBride Commission was of the view that it was confirming or establishing Indian reserves."[162] With respect, we disagree. In the pages preceding the excerpt relied on by the First Nation, McDonald JA set out the terms of the McKenna-McBride Agreement of 1912 and the Order in Council PC 1401 of 1913 – in which the Governor in Council rejected the Royal Commission's proposal to report on matters other than the size and location of Indian reserves in the province – before commenting:

> In light of the foregoing, it is clear that the authority of the Commission was restricted to the confirmation of the acreage and number of reserves in British Columbia. Indeed, the purpose of the Commission was not to allocate or reallocate reserves amongst the various Indian Bands in the province. The Commission was set up to resolve the long-standing dispute between the federal and provincial governments over the amount of land which was to be transferred to the Federal Crown for the use and benefit of the Indians as required under the Terms of Union for British Columbia.
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> The Commission was empowered to finalize the amount of land that was to be transferred to the federal Crown to be held in trust for the benefit of the Indians. Any

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[159] *Wewaykum Indian Band v. Canada* (1995), 99 FTR 1 at 87.

[160] *Roberts v. Canada*, [2000] 3 CNLR 303 at 325-26 (FCA), McDonald JA. Emphasis added.

[161] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, pp. 22-23.

[162] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 23.

> additional information that was received was included in the final report of the Commission, but *the recommendations of the Commission only addressed the issue of what amounts of land were to be transferred from the provincial to the federal Crown.*

In this excerpt, McDonald JA does *not* say that the Commission had sole authority to determine how much land was to be transferred to the federal government for the benefit of the Indians, and his reference to "the recommendations of the Commission," in the context of his earlier statement that "[a]ll decisions of the Commission were subject to governmental approval," seems to us to signal his express recognition of the limits of the Commission's decision-making powers. The Commission could not decide the Indian reserve question itself because its work was simply part of a larger process.

As with the *Ross River* case, we note that *Roberts* remains subject to appeal.

The *Jules* and *Gosnell* cases relied upon by the First Nation are not helpful to its position because they deal not with the terms of reference of the McKenna-McBride Commission but with the authority vested in Governor James Douglas during the colonial period and in the Joint Reserve Commission as of 1877. Counsel for Canada points out that Douglas was empowered to exercise the royal prerogative and therefore had the ability to create new reserves. More to the point, however, his powers regarding reserves and other matters, as set forth in his commission, were not limited and were not subject to approval of the local legislature or the imperial authorities. As MacDonald LJSC, relying on the judgment of the Privy Council in *Attorney General of British Columbia v. Attorney General of Canada*, states in *Jules*:

> As to [Governor Douglas's] powers, it may be said at once that they were absolutely autocratic. He represented the Crown in every particular, and was, in fact, the law. At the same time careful dispatches were sent to him by the Colonial Minister of the day laying down in explicit terms the methods of administration which it was desired he should follow ... In 1859 Governor Douglas issued a proclamation in the Colony dealing with the subject of land. Beginning with the assertion and declaration of the right of the Crown to the whole land of the Colony, it proceeded to state the terms on which the Crown would give grants to the settlers, and then in paragraph 5 the following announcement is made: "It shall also be competent to the Executive at any time to

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[illegible] *Roberts v. Canada*, [2000] 3 CNLR 303 at 343 (FCA), McDonald JA. Emphasis added.

[illegible] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 39.

[illegible] *British Columbia (A.G.) v. Canada (A.G.)*, [1906] AC 552 at 554–55.

> reserve such portions of the unoccupied Crown lands and for such purposes as the Executive shall deem advisable." It does not seem to [be] open to doubt that in so reserving land the Governor might be acting with a view to various objects. He is there with autocratic power to act in the interest alike of the Imperial Government and of the nascent Colony. Accordingly, it was equally within his province to reserve such land as he might consider advisable for purposes of Imperial strategy or defence, or to reserve such land as the future development of the Colony might suggest was inadvisable to part with.[266]

MacDonald LJSC concluded that Douglas had the authority to reserve, for such purposes as he deemed advisable, any unoccupied Crown lands from pre-emption by white settlers and that any steps taken by him in this regard would be binding on the imperial Crown. Accordingly, it can be seen that the powers wielded by Douglas were very much the product of the broad instructions provided to him in his commission as governor. As such, those instructions were very different from those issued to the McKenna-McBride Commission, the decisions of which were subject to approval by the federal and provincial governments.

In *Gosnell*, the plaintiff's application to pre-empt certain lands was rejected on the basis that the lands were within the boundaries of an Indian reserve set apart by the Joint Reserve Commission on March 5, 1877, and which, under the terms of the provincial *Land Act*,[267] were not open to pre-emption. It will be recalled that, in response to a recommended solution to the Indian reserve question by British Columbia Premier George Walkem, Canada's Acting Minister of the Interior, R.W. Scott, had in turn proposed that "the whole matter be referred to [the] three [Joint Reserve] Commissioners," who were, "after full inquiry on the spot into all matters affecting the question, to fix and determine for each nation, separately, the number, extent, and locality of the Reserve or Reserves to be allowed to it."[268] This aspect of the proposal had been accepted by the province without qualification. In these circumstances, the plaintiff Gosnell argued that, although the Joint Reserve Commissioners had full authority to determine the location and acreage of reserves, they had not been invested with the power of *creating* reserves, which had been entrusted solely to the Lieutenant Governor to be exercised only by means of a proclamation in the Gazette."[499] Interestingly, in that case *Canada* took the position that there was no need for an actual conveyance to create a reserve because the creation and work of the Joint Reserve Commission, the survey of the lands allotted by it, and the administration of the lands by Canada in trust for the Indians constituted "an effectual alienation from the Province to the Dominion."[500]

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[266] *Jules v. Harper Ranch Ltd.*, [1989] 3 CNLR 67 at 92–93 (BCSC).

[267] *Land Act*, SBC 1908, c. 30.

[268] R.W. Scott, Acting Minister of the Interior, to Governor General in Council, November 5, 1875, in *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), Case in Appeal, Ex. 4, pp. 45–48 (ICC Documents, pp. 51–54).

At trial, Hunter CJ of the British Columbia Supreme Court held that the lands had, since the date of their reservation, been recognized by successive representatives of the Crown as properly reserved, and that "it would be virtually a trespass upon the lands for the Provincial Government to accept any pre-emption record." He added that, since the transaction was "outside the regular course which is provided for in the local statutes" (in other words, *sui generis*), no formal transfer or conveyance was necessary "to effectually segregate these lands." Rather, they were set apart under the *Terms of Union* and thus "were well reserved without any formal notice in the Gazette."[501] Appeals to the British Columbia Court of Appeal and the Supreme Court of Canada were dismissed. In effect, from the wording of the enabling Orders in Council, it is at least arguable that the Joint Reserve Commissioners were absolutely authorized, *without review or approval by the federal and provincial governments*, to set apart reserve lands for bands in British Columbia, and, if so, the *Gosnell* case is distinguishable because the McKenna-McBride Commission did *not* have such a broad mandate. Alternatively, if decisions of the Joint Reserve Commissioners required the approval of the federal and provincial governments – and Hunter CJ implied that successive representatives of the Crown *had* recognized the lands as being properly reserved – then the mandates of the Joint Reserve Commission and the McKenna-McBride Commission were similar, but *Gosnell* is still distinguishable because approval of the latter Commission's recommendation to set apart IR 15, 17, and a portion of 18 was never given.

Other Evidence of the Royal Commission's Authority

The First Nation points to other evidence in support of its contention that the McKenna-McBride Commission was authorized to create reserves. Scott's memorandum of March 11, 1914, upon which the Order in Council of

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[499] *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), "Factum for the Appellant," p. 10 (SCC). Emphasis in original.

[500] *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), "Factum for the Respondent," p. 15 (SCC).

[501] *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), "Case in Appeal," p. 61 (SCC).

June 20, 1914, was premised, offered to refer the aboriginal title claim to Canada's Exchequer Court, with a right of appeal to the imperial Privy Council. This offer was made, however, subject to the Indians agreeing "in a binding way," if successful,

> to surrender such title, receiving from the Dominion benefits to be granted for extinguishment of title in accordance with past usage of the Crown in satisfying the Indian claim to unsurrendered territories, and to accept the finding of the Royal Commission on Indian Affairs in British Columbia, *as approved by the Governments of the Dominion and the Province* as a full allotment of Reserve lands to be administered for their benefit as part of the compensation.[402]

In speaking of this offer in the House of Commons in 1917, Superintendent General and Minister of the Interior W.J. Roche stated that

> [i]n 1915 an Order in Council was passed providing that *if the Indians would abide by the decision of an impartial tribunal as to reserves*, the full question of the Indian title would be submitted to the Privy Council, through the ordinary course. This impartial tribunal was to ascertain, with regard to each band of Indians in the province, whether the area of its reserve was large enough for the band or not. *In case the reserve was found to be too small, the British Columbia Government promised to increase its area by the addition of provincial lands*, and if the reserve was found to be larger than necessary for the band, the area was to be cut down accordingly.[403]

As we noted earlier, it seems clear that Roche was actually referring to the Order in Council of June 20, 1914, and *not* one from 1915. From the perspective of the Esketemc First Nation, his statement demonstrated that, "at least in the view of the Federal government, any additions to reserves made by the McKenna-McBride Commission were a *fait accompli* despite the statements in the respective Orders in Council that the decisions made by the McKenna-McBride Commission had to be approved by the respective governments."[404] Moreover, in response to questioning by Commissioner Purdy, counsel for the First Nation contended that, because the Indians relied on representations by Canada regarding the Royal Commission's authority, the result was an agreement by which both parties agreed to "abide" or be bound by the decisions of that "impartial tribunal."[505]

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[402] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Superintendent General of Indian Affairs, March 11, 1914; Order in Council PC 751, June 20, 1914, NA, RG 10, vol. [illegible], file [illegible], part 1. Emphasis added.

[403] Canada, House of Commons, *Debates*, June 14, 1917, 2340. Emphasis added.

[404] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 22.

The evidence before us, however, gives no indication that the members of the McKenna-McBride Commission represented to the Band that they had authority to make binding decisions such that an enforceable agreement might result if the Alkali Lake people expressed their willingness to abide by that authority. Nor do we read into Roche's statement an admission that the federal or provincial governments had delegated ultimate decision-making power to the Royal Commission. It must be remembered, moreover, that the Nishga Tribe and the Indian Rights Association of British Columbia *rejected* the offer contained in the June 20, 1914, Order in Council because they were unhappy with the McKenna-McBride Commission's terms of reference and did not want to accept its decisions without knowing what those decisions would be. Accordingly, they did *not* agree to abide by the decisions of that Commission.

It is not clear to us whether either the Allied Tribes, in which the Nishga took a leading role, or the Indian Rights Association of British Columbia spoke for the Alkali Lake Band in rejecting the offer in the June 20, 1914, Order in Council. Moreover, there is no evidence predating the public release of the report of the McKenna-McBride Commission in early 1919 to indicate how the people of Alkali Lake themselves responded to the Order in Council or whether they even knew it existed. We have no such evidence relating to the period after the report's release, either, although it seems unlikely that the Band's members would have raised any complaint, given that they would have been anticipating a net addition of 4,685.02 acres to their reserve lands. It is true that they used and occupied the lands after the report was released, but they also used and occupied the lands *beforehand*, so we cannot say that the Band took any affirmative steps in reliance on the report. In the absence of evidence from the First Nation, it is not possible for us to state conclusively that the Band either accepted or rejected the offer.

In February 1916, the Commission issued "orders" confirming the 14 existing reserves at Alkali Lake with the exception of Wycott's Flat.[506] In May it further "ordered" new reserves, including IR 15, 17, and 18, to be added to the Band's holdings[507] and asked R.A. Renwick, British Columbia's Deputy

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[505] ICC Transcript, September 26, 2000, p. 52 (Stan Ashcroft).

[506] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," February 28, 1916 (ICC Documents, pp. 567-68).

[507] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," May 26 and 27, 1916 (ICC Documents, pp. 568-69, 569-70).

Minister of Lands, to provide final clearances so that the lands could formally be allotted.[308] When it released its "orders" in consolidated form, the Royal Commission proclaimed that,

> [i]n virtue of powers and instructions from the Governments of the Dominion of Canada and the Province of British Columbia contained in Commissions issued under the Great Seal of Canada ... to us directed *authorizing and empowering us as a Commission to fix, determine and establish the number, extent and locality of the Reserves to be set aside, allowed, established and constituted for the use and benefit of the Indians* of the Province of British Columbia, *we*, the undersigned, having in each case made due enquiry into all matters affecting the requirements of the said Indians, *do hereby declare the following to be the Reserves for the undermentioned Indian Tribes respectively*.[309]

These "orders" might suggest that the McKenna-McBride Commission, acting alone, was empowered "to fix, determine and establish the number, extent and locality of the Reserves to be set aside, allowed, established and constituted for the use and benefit of the Indians of the Province of British Columbia." It is also clear that the Allied Tribes repeatedly expressed concern, based on the wording of the September 24, 1912, agreement, that the work of the Royal Commission would result in a "final adjustment of all matters relating to Indian Affairs in the Province of British Columbia." This evidence lends some support to the First Nation's position that the McKenna-McBride Commission, without more, was authorized to set apart reserves.

Still, there is also much evidence to the contrary. On August 14, 1915, the Royal Commission's Secretary, C.H. Gibbons, instructed surveyor Ashdown Green to define, map, and describe "the several parcels of land *proposed to be allowed*" in the Williams Lake area by the Commission.[310] Moreover, in the wake of completion of the Commission's report, the Allied Tribes petitioned the federal government *not* to accept it and sided with the province in seeking to further negotiate a settlement of the land question. In the spring of 1920, James Teit denounced the work of the Commissioners, stating that "[a]ll they have done is to *recommend* that about 47,000 acres of generally speaking good lands be taken from the Indians, and about 80,000 acres of generally speaking poor lands, be given in their place."[511] Similarly, after the completion of the Ditchburn-Clark review, the Allied Tribes pressed for its approval to be withheld pending the hearing before the Judicial Committee of the Privy Council; on September 25, 1916, the Duke of Connaught had assured them the hearing would be forthcoming if the Indians did not accept the findings of the McKenna-McBride Commission.

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[308] C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, to R.A. Renwick, Deputy Minister of Lands, May 18, 1916, NA, RG 10, vol. 11020, file 512B (ICC Documents, p. 564).

[309] Royal Commission on Indian Affairs for the Province of British Columbia, "Minutes of Decision," May 31, 1916 (ICC Documents, p. 566). Emphasis added.

[310] C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, to Ashdown H. Green, BCLS, August 15, 1915, NA, RG 10, vol. 11020, file 512B (ICC Documents, p. 487).

From these facts, it seems evident that the Indians, or at least the membership of the Allied Tribes, did *not* consider the reports of either the McKenna-McBride Commission or Ditchburn and Clark to represent the two governments' final word on reserve selection in British Columbia. There appears to have been a belief that, until the governments had finally approved the work of the Royal Commission as amended by Ditchburn and Clark, there were opportunities to negotiate changes, but that, once the province and Canada issued their respective Orders in Council in 1923 and 1924 to adopt the Ditchburn-Clark proposals, the only recourse left to the Indians was to press forward with litigation. The evidence is inconclusive as to whether other bands had any different understanding of the implications of the work of the Commission and its subsequent consideration, first by Ditchburn and Clark, and ultimately by the two governments.

The First Nation cites Ditchburn's letter of March 27, 1923,[512] for recognizing "the considerable authority of the McKenna-McBride Commission to allot new reserves, at least those new reserves which were outside the Railway Belt."[513] In fact, however, the 10-page letter refers repeatedly – no fewer than 29 times – to "reserves *recommended by* the Commission." The only reference to the Commission's authority is Ditchburn's backhanded comment in relation to the Railway Belt lands that he "did not consider the Royal Commission had any power under its appointment to deal with the reserves within this area and that [he] had refused to confer with a representative of the Government of British Columbia as to the merits of any decisions this Commission may have arrived at with regard to the same." From this statement it might be inferred that the McKenna-McBride Commission had at least *some* authority to deal with lands outside the Railway Belt, but not necessarily that it had *decision-making* authority. Similarly, the letter dated

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[511] Statement by James Teit, spring 1920, in *Appendix to the Journals of the Senate of Canada, 1926-27, Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), 125.

[512] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 27, 1923 (ICC Documents, pp. 458 and 467).

[513] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 19.

April 6, 1923, from T. Duff Patullo, British Columbia's Minister of Lands, to Scott,[314] on which counsel relies as demonstrating the province's acceptance of the power and authority of the McKenna-McBride Commission,[315] merely reveals Patullo's view that the Commission was authorized to deal in the same manner with *all* reserves in the province, whether within or outside the Railway Belt, but does not address the *nature* of the Commission's authority in any way.

From all the foregoing evidence, it seems clear that, despite language in the agreement of September 24, 1912, that appeared to imbue the McKenna-McBride Commission with the "power to adjust the acreage of Indian Reserves in British Columbia," the intent of the federal and provincial governments as set forth in the subsequent enabling Orders in Council was to *limit* the authority of the Commission to making *recommendations*. We reached the same conclusion in our report on the McKenna-McBride application of the 'Namgis First Nation, where we stated that "the [McKenna-McBride] Commission's recommendations, of course, were not binding on either the federal or the provincial governments."[316] We did not have before us in that inquiry the broad range of historical evidence furnished by the parties to the present proceedings or uncovered through our own investigations, nor did the parties in the earlier inquiry forcefully argue the point. Nevertheless, despite some evidence to the contrary, the additional evidence and argument now before us has merely served to underscore our previous conclusion that the "decisions" of the McKenna-McBride Commission were subject to approval and did not, standing alone, result in the creation of reserves in British Columbia.

The federal and provincial governments had an interest in creating reserves and they intended to create reserves, but only through a process in which the recommendations of the McKenna-McBride Commission would be subject to their approval. To paraphrase Gerein J in *Lac La Ronge Indian Band v. Canada*, it was open to the federal and provincial governments to establish the process by which reserves would be created, including deputing a suitable group of persons such as the McKenna-McBride Commission and deciding what authority those deputies would have. Canada had legislative jurisdiction over Indians and lands reserved for Indians under section

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[314] T.D. Patullo, Minister of Lands, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, April 6, 1923, British Columbia Ministry of Lands, file 026776 (ICC Documents, p. 461).

[315] Written Submission on Behalf of the Esketemc First Nation, July 28, 2000, p. 49.

[316] ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998) 7 ICCP 109 at 150.

91(24) of the *Constitution Act, 1867*, but British Columbia owned the land, which could not be alienated without its approval and concurrence. Canada correctly maintains that reserve creation in British Columbia required the joint action of the federal and provincial governments, and the First Nation is just as correct in asserting that the McKenna-McBride Commission represented joint action. Still, in jointly creating that Commission, the two governments had the option of entrusting the McKenna-McBride Commission with absolute authority to create reserves or retaining that authority themselves. As Gerein J stated:

> The act of deputation does not of necessity entail a complete abdication of authority. In the historical record there are examples of both approaches.

Ultimately, the two governments chose to retain authority.

Evidence of the Elders and Other Indicia of Reserve Creation

We have also had careful regard for the evidence presented to the Commission by the First Nation's elders during the community session of May 2, 2000, regarding the use of IR 15, 17, and 18 by band members. In addition, we have considered the other indicia of reserve creation on which counsel relied in support of his contention that the McKenna-McBride Commission had in fact created reserves. From this evidence we have no doubt that the elders and their ancestors for many years held the honest belief that IR 15, 17, and 18 belonged to the Band, and that band members used and occupied those lands for extended periods of time both before and after the hearings conducted by the Royal Commission. We must also acknowledge that the sorts of indicia relied upon by counsel have been referred to by the courts in other cases in support of findings that reserves existed. Nevertheless, these factors have always been considered in the context of whether they tend to confirm or deny the conditions for reserve creation, which, although not requiring formalities, must still include the intention to create a reserve, a positive act by an authorized public official to give effect to the intention, and, in British Columbia after 1871, provincial concurrence. The indicia relied upon by counsel must be measured against these requirements.

First, we must acknowledge that the McKenna-McBride Commission *did* consult with the members of the Alkali Lake Band, but the process of consultation alone does not create a reserve. The relevant parties – in this case,

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87 *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 350 (Sask. QB).

Canada and British Columbia – would have had to have not only the general intent to establish reserves for bands within the province, which they did, but also the specific intent that the Royal Commission, acting alone, would have the authority to create reserves, and in particular IR 15, 17, and 18. We are unable to conclude that such specific intent existed in this case.

Second, surveyor Ashdown Green *did* survey the lands for which members of the Band had applied as additions to their reserves, and these lands were even allocated tentative reserve numbers by the Commission. These actions, however, were as consistent with identifying the lands and protecting them from alienation to third parties pending a final decision by the two governments, as was done in this case, as they were with actually creating reserves. Although in some cases surveyors have been given the authority to set apart reserves, we do not find any evidence that Green's authority extended that far.

Third, counsel for the First Nation submits that Canada treated IR 15, 17, and 18 as reserves because it required children who resided there to attend residential school and it provided rations to elders living there. We have no reason to doubt that Esketemc children were required to attend school and that elders residing on IR 15, 17, and 18 received rations at Alkali Lake, but even so we see no causal connection between these facts and the existence of a reserve. Similarly, we must agree with Canada that Hazel Johnson's evidence regarding the role of the Indian police to ensure that non-natives did not enter the community, including the meadow lands, is not probative as to "the terms of reference creating the Indian police and whether they had any jurisdiction over the Lands, why Indian police might have been asked to keep non-aboriginals away from the Lands[.] … whether such actions, if true, were authorized by the Crown" or whether "those creating the Indian police had authority to create a reserve."[335]

Fourth, counsel for the First Nation further submits that Canada treated IR 15, 17, and 18 as reserves because it allowed the Esketemc people to continue residing there, it did not tell them that those lands had been disallowed as reserves, it did not protest their ongoing use of the lands, and it only told them to leave when the school was established at Alkali Lake in the late 1950s. Although there is evidence that the Special Joint Committee of the Senate and House of Commons in its final report dated April 9, 1927, recommended that its decisions "should be made known as completely as possible to the Indians of British Columbia … in order that they may become aware of the finality of the findings."[519] there is no such evidence before us to indicate that the changes recommended by Ditchburn and Clark, including the disallowance of IR 15 and 17 and the reduction of IR 18, were likewise communicated to the Indians of British Columbia.

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[335] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 58.

A number of the First Nation's elders testified that they lived on IR 15, 17, and 18 until the 1950s and 1960s, often oblivious to the fact that those lands were not reserves and believing they belonged to the Band. Chief Andy Chelsea testified that Indian Agent Eric Underwood was aware as late as 1973 that members of the First Nation were still using the lands but apparently turned a blind eye to that use as long as it did not cause other problems.[520] It is also evident, however, that the lands had been used by band members – at first in their traditional pursuits and in later years to provide feed and pasture for their cattle and horses as they converted to ranching – for a number of years before the McKenna-McBride Commission visited the area in 1914. It would not be surprising for band members to believe that the lands belonged to them for several reasons: first, because, in the sense of unextinguished aboriginal title, that may have been – and may still be – the case; second, because they resided on lands that had formed the subject of an intended, albeit incomplete, reserve creation process; and, third, because they had never been told IR 15, 17, and 18 were not reserve lands. Nevertheless, the honestly held beliefs of the Band's members do not mean that the lands ever became reserves. On the evidence before us, we must conclude that they did not.

ISSUE 4 THE AUTHORITY OF DITCHBURN AND CLARK

Did W.E. Ditchburn and J.W. Clark exceed their authority with respect to IR 15, 17, and 18? If so, did that create a lawful obligation on Canada?

The Esketemc First Nation submits that W.E. Ditchburn and J.W. Clark exceeded their authority under federal and provincial legislation when they recommended the disallowance of IR 15 and 17 and the reduction of IR 18. It will be recalled that the federal *British Columbia Indian Lands Settlement Act* states:

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[519] Hewitt Bostock, Chairman, "Report," April 9, 1927, in *Appendix to the Journals of the Senate of Canada 1926-27: Special Joint Committee of the Senate and House of Commons appointed to inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926* (Ottawa: King's Printer, 1927), xvii.

[520] ICC Transcript, May 2, 2000, p. 136 (Chief Andy Chelsea).

> 2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfill every act, deed, matter or thing necessary for the carrying out of the said [McKenna-McBride] Agreement between the Governments of the Dominion of Canada and the Province of British Columbia according to its true intent, and for giving effect to the report of the said Royal Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.
>
> 3. For the purpose of adjusting, readjusting or confirming the reductions or cut-offs from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cutoffs to be effected without surrenders of the same by the Indians, notwithstanding any provisions of the Indian Act to the contrary, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments.[521]

British Columbia's *Indian Affairs Settlement Act* was similar but not identical:

> 2. To the full extent to which the Lieutenant-Governor in Council may consider it reasonable and expedient, the Lieutenant-Governor in Council may do, execute, and fulfil every act, deed, matter, or thing necessary for the carrying out of the said [McKenna-McBride] Agreement between the Governments of the Dominion and the Province according to its true intent, and for giving effect to the report of the said Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.
>
> 3. Without limiting the general powers by this Act conferred, the Lieutenant-Governor in Council may, for the purpose of adjusting, readjusting, or confirming the reductions, cut-offs, and additions in respect of Indian reserves proposed in the said report of the Commission, carry on such further negotiations and enter into such further agreements, whether with the Dominion Government or with the Indians, as may be found necessary for a full and final adjustment of the differences between the said Governments.[522]

A plain reading of section 2 of each statute reveals that these provisions conferred authority upon the Governor in Council and the Lieutenant Governor in Council, respectively, to do whatever they considered "reasonable or expedient" to carry out the McKenna-McBride Agreement "according to its true intent," to implement the report of the Royal Commission "in whole or in part," and to adjust fully and finally all differences between Canada and British Columbia regarding Indian lands and affairs in the province. Ditchburn and Clark were the appointed agents of the federal and provincial governments to review the recommendations of the McKenna-McBride Commission, and they were apparently delegated the necessary powers to do so. At any rate, the First Nation has not raised the validity of their appointments or the soundness of the delegations as issues in this inquiry, focusing instead on the whether their actions fell within the scope of the foregoing legislation. Accordingly, we have likewise limited our deliberations on the extent of their mandates.

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[521] *British Columbia Indian Lands Settlement Act*, SC 1920, c. 51.

[522] *Indian Affairs Settlement Act*, SBC 1919, c. 32.

From the perspective of the First Nation, because Ditchburn and Clark were appointed by their respective governments and not under the federal *Inquiries Act*, they did not enjoy the same degree of independence as the McKenna-McBride Commission and did not hold an inquiry or conduct interviews with bands, Indian agents, and others as the Royal Commission had done.[525] Their role, counsel contends, was to carry out the McKenna-McBride Agreement of 1912 "according to its true intent." Based on the principles of interpretation applicable to statutes affecting Indian interests, this meant, in counsel's submission, that Ditchburn and Clark were empowered to allot new reserve lands liberally where required, but their powers to reduce existing reserves and the new allotments recommended by the McKenna-McBride Commission were to be construed strictly. In particular, in the view of the First Nation,

> while Mr Clark could, according to the *Indian Affairs Settlement Act* adjust, re-adjust, or confirm the reductions, cut-offs, and additions as recommended by the McKenna-McBride Commission, there was nothing empowering him to undertake his own cut-offs or reductions from the additions to reserves or additional reserves allotted by the McKenna-McBride Commission. The *British Columbia Indian Lands Settlement Act* is even more confining in that it simply allowed Mr Ditchburn to adjust, re-adjust, or confirm the reductions or cut-offs made by the McKenna-McBride Commission. *There was nothing in either legislation authorizing Mr Clark or Mr Ditchburn to cut-off additions to reserves or additional reserves allotted by the McKenna McBride Commission.*
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> It may be said that the general clause authorizing Messrs Ditchburn and Clark to give effect to "the Report of the said Commission, either in whole or in part" permitted them to make cut offs to reserves allotted by the McKenna McBride Commission

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[525] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 28.

> In my submission, however, this was insufficient authority, for the purpose was clearly to give effect to a report of the McKenna-McBride Commission "according to its true intent", which would mean that where the McKenna-McBride Commission found that a particular Band had insufficient land as reserve and set aside additional reserve land to meet that need *their decision was final unless the federal governments could prove the McKenna-McBride Commission was in error*. In my submission, the portion of the text referring to giving effect to the Report of the McKenna-McBride Commission "either in whole or in part" is tempered by the words "according to its true intent" and, in addition, the words "reasonable and expedient". Thus, in my submission, in order for Messrs. Ditchburn and Clark to cut off any of the additions to reserves made by the McKenna-McBride Commission *it would require them to show that the First Nation in question clearly had sufficient land for their needs and that it was reasonable for such cut-offs to occur*. Given the documentary and oral evidence, I do not think that it can be denied that the Esketemc desperately needed additional Reserves 15, 17, and 18 and it was unreasonable for Messrs. Ditchburn and Clark to cut off same.[524]

Counsel further contends that the McKenna-McBride Commission was given a specific statutory mandate that permitted it to cut off reserve lands set aside for a First Nation without the necessity of obtaining a surrender, but Ditchburn and Clark had no such mandate.[525] Therefore, even if IR 15, 17, and 18 constituted only *de facto* reserves, they could not be cut off, in counsel's submission, without complying with the surrender requirements of section 49 of the 1906 *Indian Act* or entering into a further agreement with the Alkali Lake Indians as contemplated by section 3 of the *Indian Affairs Settlement Act*.[526]

Canada takes the position that the wording of the two statutes did not limit the powers of the Governor in Council and his provincial counterpart simply to adjusting, readjusting, or confirming the reductions or cut-offs recommended by the McKenna-McBride Commission.[527] In other words, Canada and British Columbia, acting on the recommendation of Ditchburn and Clark, were also able to effect reductions of additions proposed by the McKenna-McBride Commission since, absent this power, the Commission's additions would represent final determinations of reserve lands. The two governments were additionally authorized to carry on further negotiations and enter into further agreements – with British Columbia, in the case of Canada, and with Canada *or the Indians*, in the case of British Columbia.

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[524] Written Submission on Behalf of the Esketemc First Nation, July 28, 2000, pp. 29–30. Emphasis added.
[525] Written Submission on Behalf of the Esketemc First Nation, July 28, 2000, p. 52.
[526] Written Submission on Behalf of the Esketemc First Nation, July 28, 2000, pp. 52, 55, and 58.
[527] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 51.

With particular regard for the provincial legislation, Canada notes that section 3 of the *Indian Affairs Settlement Act* opened with the words "Without limiting the general powers by this Act conferred." Those general powers were, in Canada's view, set forth in section 2 of each statute, the wording in each case being virtually identical and conferring a broad discretion to the Governor in Council and the Lieutenant Governor in Council, respectively, to do what was considered "reasonable and expedient" to carry out the McKenna-McBride Agreement of 1912 "according to its true intent." Section 3 of the *British Columbia Indian Lands Settlement Act* does not open with the same words, but in counsel's submission that does not matter because the intent of the federal provision was not to limit section 2 but to clarify that, from the date of that legislation, the Governor in Council could order *existing* reserves to be reduced or cut off without having to resort to the usual procedure for surrendering reserves set forth in section 49 of the 1906 *Indian Act*.[528]

In counsel's submission, further support for his contention that each section 2 conferred a broad discretion may be found in British Columbia's Order in Council 911 of July 26, 1923, and Canada's Order in Council PC 1265 of July 19, 1924, which adopted the work of the McKenna-McBride Commission as amended by Ditchburn and Clark. The preamble of each Order in Council stated that Ditchburn and Clark, as representatives of the two governments, were "appointed for the purpose of *adjusting, readjusting, confirming and generally reviewing* the report and recommendation of the Royal Commission." Similarly, the substantive recommendations in each Order in Council as subsequently approved by the Governor in Council and the Lieutenant Governor in Council provided

> THAT the Report of the Royal Commission of Indian Affairs as made under date of the 30th day of June 1916, with the amendments thereto as made by the representatives of the two Governments, viz: Mr. W.E. Ditchburn, representing the Dominion Government and Major J.W. Clark, representing the Province, *in so far as it covers the adjustments, readjustments or confirmation of the reductions, Cut-offs and additions in respect of Indian Reserves proposed in the said report of the Royal Commission*, as set out in the annexed schedules, be approved and confirmed as constituting full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfillment of

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[528] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 51

> the said Agreement of the 24th day of September 1912, and also of Section 13 of the Terms of Union....[529]

On this issue, we are in general agreement with the position taken by Canada. IR 15, 17, and 18 were nothing more than recommended additional lands that the McKenna-McBride Commission believed the people of Alkali Lake should receive. Because these particular recommendations were never accepted by Canada and British Columbia, these lands never became reserves in even the *de facto* sense.

As for the need for surrenders, the facts as we read them do not accord with the interpretation given them by counsel for the First Nation. The terms of reference of the McKenna-McBride Commission did not contemplate the Crown, let alone the Royal Commission, being able to cut off reserves without surrenders; Canada's authority to do so did not arise until it enacted the *British Columbia Indian Lands Settlement Act* in 1920. Although the proclamation of December 23, 1876, permitted the Joint Reserve Commissioners, as well as Sproat, O'Reilly, and Vowell, to reduce reserves before 1912 without surrenders, the McKenna-McBride Agreement provided that, where the Commissioners found the Indians of a particular band to have more land than they reasonably required, the reserve was to be reduced "with the consent of the Indians, as required by the Indian Act." In any event, this is of no concern in the present inquiry, given our finding that IR 15, 17, and 18 were not *reserves* but merely *proposed* reserves and therefore did not trigger the surrender requirements of the *Indian Act*.

As for the First Nation's argument that the *British Columbia Indian Lands Settlement Act* and the *Indian Affairs Settlement Act* did not authorize Ditchburn and Clark to cut off additions recommended by the McKenna-McBride Commission, we disagree. Section 2 of each statute was broadly worded and provided considerable scope for Ditchburn and Clark to review the Royal Commission's report and to propose changes to its recommendations. We acknowledge the principle of statutory interpretation that requires us to construe strictly provisions that would limit or abrogate Indian rights. We must also have regard, however, for the rejection by La Forest J in *Mitchell* of the idea that an interpretation preferred by the Indians should automatically be accepted over any competing interpretation simply because of the "salutary rule that statutory ambiguities must be resolved in favour of the Indians"; as La Forest J went on to say, "[i]t is also necessary to reconcile any given interpretation with the policies the Act seeks to promote."[530] In this case, it is evident that, in passing the *British Columbia Indian Lands Settlement Act* and the *Indian Affairs Settlement Act*, Canada and British Columbia intended a full review of the work of the McKenna-McBride Commission because of the province's belief that the McKenna-McBride Commission had been overly generous in its allotments of reserve lands to the Indians. Although we have not yet considered the merits of the province's position on this point – we will address that issue below – we are not persuaded that the legislation which eventually spawned the review by Ditchburn and Clark was not intended to permit them to propose reductions to the reserve additions recommended by the McKenna-McBride Commission. From the province's perspective, at the very least, such reductions were the very *raison d'être* for Ditchburn and Clark.

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[529] Order in Council 911 (British Columbia), July 26, 1923 (ICC Documents, p. 478). Emphasis added.

Accordingly, we cannot agree that the mandate of Ditchburn and Clark was limited as contended by the First Nation.

ISSUES 5, 6, AND 7 FIDUCIARY OBLIGATION

Did Canada owe a statutory duty, fiduciary duty or trust responsibility to the Alkali Lake Band to:

(a) protect and preserve the Lands for the Alkali Lake Band;
(b) obtain reserve status for the Lands and have them set apart for the use and benefit of the Alkali Lake Band;
(c) obtain adequate alternate land as reserve set apart for the use and benefit of the Alkali Lake Band;
(d) obtain or pay monetary compensation to the Alkali Lake Band for the Lands;
(e) invoke Article 13 of the *Terms of Union* admitting British Columbia into Canada;
(f) take the position that the Lands fell within the purview of subsection 91(24) of the *Constitution Act, 1867*; and/or
(g) invoke Section 37A of the *Indian Act* of 1910?

If Canada owed a statutory duty, fiduciary duty or trust responsibility to the Alkali Lake Band, did Canada breach such duty or responsibility?

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[530] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 142-43, La Forest J.

Did Canada, through W.E. Ditchburn, owe a fiduciary duty or duties to the Alkali Lake Band to:

(a) represent the Band's interests during the discussions with J.W. Clark and Grazing Commissioner Thomas A. MacKenzie regarding the potential cut-offs; and
(b) seek adequate alternative lands to be added to the Alkali Lake reserves?

If so, did Canada breach any such duty or duties?

The Esketemc First Nation takes the position that, regardless of whether IR 15, 17, and 18 became reserves upon their identification by the McKenna-McBride Commission, those lands initially attracted certain duties owed by Canada to the people of Alkali Lake: to preserve and protect the lands, and to set them apart formally as reserves for the Band's use and benefit. Later, when British Columbia's representatives challenged the findings of the McKenna-McBride Commission and sought to reduce or eliminate IR 15, 17, and 18, Canada's obligation to preserve and protect the lands gave rise to the further duty of representing and "fighting valiantly" on behalf of the First Nation's interests in discussions with the province. Ultimately, if British Columbia proved unwilling to relent, the First Nation argues, Canada became further obliged to refer the matter to the Secretary of State for the Colonies for a decision under Article 13 of the *Terms of Union*, to commence litigation on the First Nation's behalf under section 37A of the 1906 *Indian Act*, as amended, or simply to declare the lands to be reserves – and beyond the legislative competence of the province – under section 91(24) of the *Constitution Act, 1867*. Finally, if the lands could not be preserved and set apart for the First Nation, then, in the First Nation's view, Canada was obliged to acquire adequate alternative lands for the use and benefit of the Esketemc people or to obtain or pay monetary compensation to them in lieu of the lands.

At the outset, we should note that we do not intend to address the fiduciary issues in precisely the order or manner argued by the parties. To a certain extent, this is because we have already concluded that the efforts of the McKenna-McBride Commission, acting alone, did *not* result in IR 15, 17, and 18 being set apart as reserves. In this respect, we agree with Canada's position. The effect of this conclusion is that some of the First Nation's arguments predicated on the assumption that these lands *did* become reserves must fail. However, a number of the First Nation's arguments are not based *solely* on the status of IR 15, 17, and 18 but rather relate in some measure to the *conduct* of Canada as a fiduciary in the negotiations following the release of the McKenna-McBride Commission's report.

With regard to these fiduciary issues, Canada does not simply disagree on the content of the federal government's fiduciary obligations and on whether the federal government met those obligations. Rather, Canada disputes whether, on the facts of this case and on legal principle, a fiduciary obligation existed *at all*. Accordingly, the parties in their written and oral submissions have initially taken the Commission back to basic principles of fiduciary law. In the course of considering those principles, we will first review the case authorities on which the First Nation grounds its claim that a fiduciary relationship exists between Canada and aboriginal peoples.

We will then carefully consider certain defences raised by Canada to the First Nation's claim that fiduciary obligations arise in the process of reserve creation. First, Canada argues that, to prove a fiduciary duty owing by Canada to a band with regard to a particular parcel of land *before* a reserve is created, the band must establish that it has a *pre-existing legal interest* in that land – something that, in counsel's view, the First Nation has not done. Second, Canada argues that reserve creation constitutes a *public* law duty rather than a *private* law duty, the implication being that public law duties, arising as they do out of legislative or executive actions, do not attract fiduciary obligations and are not open to review by the courts or the Commission. Third, Canada contends that a breach of fiduciary obligation implies a "stench of dishonesty" arising from circumstances akin to fraud or deceit, neither of which, in counsel's submission, was present in this case.

Finally, should we conclude that Canada's defences do not decide the case, we must consider the relationship between Canada and the First Nation and the test or tests to be applied in determining whether a fiduciary obligation arises, given the nature of that relationship. At that point, depending on our conclusions, we will move on to determine whether the fiduciary duties claimed by the First Nation arose on the facts of this case and, if so, whether they were satisfied.

Principles of Fiduciary Law

The Source of Canada's Fiduciary Relationship with the Indians

The fiduciary relationship of Canada and First Nations has been clearly established by an increasingly lengthy line of cases, beginning with *Guerin v.*

The Queen,[551] in which the Supreme Court of Canada has repeatedly recognized the *sui generis* or "unique character both of the Indians' interest in land and of their historical relationship with the Crown."[552] The effect of these decisions is that the relationship between the Crown and aboriginal peoples is "trust-like" or fiduciary in nature, particularly in relation to the reservation and protection of land.

It will be recalled that, in *Guerin*, the Musqueam Band surrendered 162 acres of reserve land to the Crown for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The Band later discovered that the terms of the lease obtained by the Crown were significantly different from those the Band had agreed to and indeed were less favourable. All eight members of the Court found that Canada had breached its duty to the Band, although Wilson J (Ritchie and McIntyre JJ concurring) founded the obligation on trust principles and Estey J considered the relationship to be one of principal and agent. However, Dickson J (as he then was), with the concurrence of Beetz, Chouinard, and Lamer JJ, took a different approach:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[553]

Dickson J later added:

> The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surren-

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[551] *Guerin v. The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120.

[552] *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

[553] *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

> dering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.[334]

Six years later, in *R. v. Sparrow*, decided in 1990, the Supreme Court once again considered the application of fiduciary principles to the relationship between Canada and a member of a First Nation. The case dealt with aboriginal fishing rights – specifically, whether the restriction in the federal *Fisheries Act* regarding the permitted length of a drift net was inconsistent with secaion 35 of the *Constitution Act, 1982*, and therefore invalid. In outlining the approach to be taken with respect to interpreting section 35, Dickson CJ and La Forest J, who co-wrote the decision of the entire Court, gave a broad interpretation to the fiduciary analysis in *Guerin*:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s. 35(1). That is, *the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship*.[335]

In the context of these cases, the Esketemc First Nation contends that the "fiduciary obligation is ... a broad one attaching to the relationship between the Crown and Indian peoples generally," being "consonant with the established legal principles" wherein the courts have used fiduciary doctrine "to supervise [trust-like] relationships within which one party is possessed of a discretion or power that it may wield to the detriment of the other."[536] According to counsel,

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[334] *Guerin v. The Queen*, [1984] 2 SCR 335 at 386–87, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

[335] *R. v. Sparrow*, [1990] 1 SCR 1075 at 1108, [1990] 3 CNLR 160, Dickson CJ and La Forest J. Emphasis added.

> [t]he relationship is not a modern creation: it finds its roots in the earliest expression of colonial policy, and has existed since at least the date of the *Royal Proclamation of 1763*. The Crown therefore has owed, and continues to owe Indian peoples an obligation at law to protect their interests in reserve land, *de jure* or *de facto*, aboriginal title land and land encumbered by an Indian interest. More generally the Crown owes a fiduciary duty to Indian peoples not to exercise its powers and discretion in ways that adversely affect the legal or practical interests of the latter.[537]

The fiduciary relationship between the Crown and Indians is based in part on a historical relationship of dependency that is, in counsel's view, confirmed and reflected in the *Indian Act* – rather than created by it. In that legislation, the Crown undertakes to act on behalf of the Indians to protect their interests in transactions with third parties.[538]

Canada acknowledges that the Crown *can* at times become subject to legally enforceable fiduciary obligations but suggests that the principles in *Sparrow* do not apply to the present case because they concern only legislative action after 1982 in relation to aboriginal or treaty rights.[539] This the First Nation disputes, arguing that the historical basis for the *sui generis* relationship between Canada and aboriginal peoples has been referred to in several cases and extends farther than the narrow factual contexts of cases like *Guerin* and *Sparrow*.[540] For example, in *Mitchell v. Peguis Indian Band*, La Forest J stated:

> [T]he historical record makes it clear that ss. 87 and 89 of the *Indian Act* [exempting the Indian interest in reserves, surrendered lands and personal property situated on a reserve from taxation and attachment through legal process] ... constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation in 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.[541]

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[536] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 42.
[537] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 43.
[538] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, pp. 4–5.
[539] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 56.
[540] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 5.
[541] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 131, La Forest J.

According to counsel for Canada, however, the relationship between the Crown and aboriginal peoples, although "identified over time" as fiduciary within the circumstances of particular cases,[542] does not always give rise to a fiduciary obligation. In this regard, Canada relies on *Québec (Attorney General) v. Canada (National Energy Board)*,[543] where the Supreme Court of Canada also explicitly recognized that there are limits on the Crown's fiduciary obligations to Indian bands. In that case, following lengthy public hearings including extensive submissions by the Grand Council of Crees (of Quebec) and the Cree Regional Authority (the appellants), the National Energy Board issued licences to Hydro-Québec to export electrical power to the states of New York and Vermont. The appellants claimed, among other grounds of appeal, that the board was an agent of government and a creation of Parliament and thus owed the appellants, by virtue of their status as aboriginal peoples, a fiduciary duty extending to the decision-making process used in considering applications for export licences. According to the appellants, the board was therefore required to go beyond principles of natural justice and, to ensure their full and fair participation in the hearing process, to compel that all information necessary for them to make their case against the applications be disclosed. The appellants further argued that the board was obliged to take their best interests into account when making its decision.

On behalf of the entire Court, Iacobucci J rejected these submissions, concluding that, since the board was a quasi-judicial tribunal, it was not required to make its decision in the best interests of the Grand Council and the Regional Authority. However, his reasons also applied to the fiduciary relations of the Crown and aboriginal peoples in more general circumstances:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[544]

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[542] ICC Transcript, September 26, 2000, p. 178 (Michael Mladen).

[543] *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159 (hereafter referred to as the *National Energy Board* case).

[544] *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183. Emphasis added.

Although Canada has emphasized Justice Iacobucci's finding that not every aspect of a relationship between fiduciary and beneficiary takes the form of a fiduciary obligation, we believe it is equally significant that he considered the fiduciary nature of the relationship between Canada and First Nations to be "well settled."

Similarly, in *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (hereinafter referred to as the *Apsassin* case),[545] the Supreme Court of Canada considered the existence of a fiduciary relationship between the Crown and the Beaver Band of Indians in the context of an inadvertent surrender of mineral rights during the course of a broader surrender of reserve land for the settlement of war veterans. The reasons of both Gonthier and McLachlin JJ suggest that, in the proper circumstances, the Crown might owe fiduciary duties to a band in the pre-surrender context – in particular, where the band's understanding of the terms of the surrender is inadequate, where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention, where the band has ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or where the surrender is so foolish or improvident as to be considered exploitative. Nevertheless, on the facts in *Apsassin*, the Court concluded that Canada had not breached any *pre-surrender* fiduciary obligations to the Band. However, the Court *did* find that, in the course of disposing of former reserve lands *after* the surrender, Canada's usual practice was to retain the mineral rights when granting title to the surface, commenting that a reasonable person does not (a) inadvertently give away a potentially valuable asset that has already demonstrated earning potential, or (b) give away for no consideration that which it will cost him nothing to keep and which may one day possess value, however remote the possibility. Canada's failure in that case to retain the mineral rights, or to take available steps to reacquire those rights, thus amounted to a *post-surrender* breach of fiduciary obligation.

In light of the foregoing cases, we feel secure in concluding that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada in relation to the Indian interest in land. That being said, we must acknowledge the comments of Iacobucci J in the *National Energy Board* case that "not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation." As we have seen, Canada has raised three reasons why, in its view, a fiduciary obligation should not be found to have arisen in the context of the fiduciary relationship between the Crown and the people of Alkali Lake. It is those defences to which we now turn.

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[545] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

Defences Raised by Canada

(a) Pre-existing Interest in Land

As it did in the two inquiries before this Commission involving the 'Namgis First Nation, Canada argues that, unless and until the lands comprising IR 15, 17, and most of 18 became reserves – which they never did – the people of Alkali Lake did not have an interest in those lands capable of attracting fiduciary obligations. In response to this argument in the Cormorant Island inquiry, we wrote:

> The difficulty we have with Canada's argument is that it is based on the premise that a band has an "interest" only after a reserve has been created. This is inconsistent with Mr. Justice Dickson's statement in *Guerin* that the Indians' interest in their lands "is a pre-existing legal right" and that this interest is the same whether one is concerned with the interest of a band in a reserve or with unrecognized aboriginal title in traditional tribal lands. In other words, as we understand Mr. Justice Dickson's reasons, there is an independent legal interest in the land even before the reserve is created."[56]

In *Guerin*, Dickson J stated:

> ... *Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, none the less predates it.* For this reason *Kinloch v. Secretary of State for India, supra; Tito v. Waddell, supra,* and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. *Their interest in their lands is a pre-existing legal right* not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.
>
> *It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in*

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[56] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3 at 55.

> both cases: see *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401, at pp. 410–11 (the *Star Chrome* case).[547]

Accordingly, the Commission concluded in the 'Namgis inquiries that there is an independent legal interest in the land even before the reserve is created. Ultimately, we took the view that it is possible for an enforceable fiduciary obligation to arise in the reserve creation process.[548]

Canada now challenges this finding on the basis that the Commission in the Cormorant Island report did not indicate

> what exactly is the "pre-existing legal right" or "independent legal interest" that the 'Namgis had in the lands in issue. Obviously, Canada does not owe the 'Namgis or the Alkali Lake Band a fiduciary duty with respect to any and every parcel of land throughout the country that they may simply claim. For the Crown to owe a fiduciary duty to a band with respect to a particular parcel of land, there must first be proof that the Band actually has a pre-existing legal right to the land.[549]

After quoting Justice Dickson's statement in *Guerin* that the fiduciary relationship between the Crown and the Indians "depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown,"[550] counsel for Canada submits that the only such Indian interests in land are their interests in reserves "or lands over which a First Nation has unextinguished aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*." Counsel notes that IR 15, 17, and 18 were never reserves and that the Esketemc First Nation has not claimed to have treaty rights. With regard to a claim based on unextinguished aboriginal rights, counsel bases Canada's position primarily on *Delgamuukw v. British Columbia*,[551] asserting that (1) aboriginal rights must be proven on a site-specific basis, (2) such rights will not be presumed to exist, (3) the Indian Claims Commission is not the proper forum for establishing such rights, and (4) the First Nation has not proven that such rights existed in any event. Even if it *had* proven the existence of such rights, says counsel, the First Nation has not shown that the reserve creation process in this case – the recommendations of the McKenna-McBride Commission as amended by Ditchburn and

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[547] *Guerin v. The Queen*, [1984] 2 SCR 335 at 379, Dickson J. Emphasis added.

[548] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998) 7 ICCP 3 at 52–54; ICC, *Inquiry into the McKenna McBride Applications Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998) 7 ICCP 109 at 165–66.

[549] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 54–60.

[550] *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, Dickson J.

[551] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

Clark and approved by the federal and provincial governments – extinguished or adversely affected the First Nation's pre-existing aboriginal rights in lands that did not become reserves, such as IR 15 and 17 and portions of IR 18. "[W]hatever rights the Alkali Lake Band may have had in the Lands [IR 15, 17, and 18] before the reserve creation process, existed afterwards."[552]

In response to these submissions, the First Nation states:

> in case there is any doubt, the Band is not through the Specific Claims process claiming an aboriginal right or title to the Lands. That will be left for the treaty process. The Band's position is that it had a legal reserve interest in the Lands or, in the alternative, a sufficient practical interest in the Lands or in the further alternative or in addition a sufficient interest in the Lands capable of creating a fiduciary relationship as between Canada and the Band.[553]

In support of this position, the First Nation cites *Frame v. Smith*, in which Wilson J held that one characteristic of relationships in which a fiduciary obligation has been imposed is that "[t]he fiduciary can unilaterally exercise ... power or discretion so as to affect the beneficiary's legal *or practical* interests."[554] According to counsel,

> [i]n the alternative, at the very least, the Band's interest in I.R.s 15, 17 and 18 was the equivalent of a conditional interest held in the Lands whereby the Band had the right to exclude third parties from the Lands until the Lands were either confirmed, or in this case rejected, by the Governor in Council and Lieutenant Governor in Council. As party to the McKenna-McBride Commission, the Province undertook the task of ensuring that the lands applied for both before and during the Commission's work were not otherwise alienated until the McKenna-McBride Commission had finished its Report. As such, they were "set apart" and effectively off-limits until the McKenna-McBride Commission's decision was ratified by Canada and British Columbia. British Columbia was precluded from granting preemptive rights over the Lands. Given all of this, even if there was not a strict legal impediment, there was a practical one. This was enhanced by the fact that the Esketemc people were occupying the Lands. The Band had at the very least a practical, if not a legal, interest in the Lands at least until they were cut off pursuant to the decisions of Messrs. Ditchburn and Clark.[555]

In light of these new arguments asking us to define the First Nation's pre-existing legal right, the Commission has carefully reviewed the case law referred to us by counsel, but our conclusions regarding the pre-existing legal rights of Indians in their lands remain unchanged. With regard to Canada's assertion that the Indian Claims Commission is not the proper forum for establishing the rights claimed by the Esketemc First Nation in this case, we would add to our earlier remarks relating to our mandate that we see many parallels between this case and our interim ruling in relation to the Kluane First Nation. In that ruling, we expressed our concern with Canada's view that aboriginal peoples cannot assert aboriginal rights unless Canada has recognized those rights or the courts have ruled that those rights exist. A reading of Canada's comprehensive claims policy, *In All Fairness*, indicates that Canada conducts comprehensive negotiations with those First Nations who are assumed to have unextinguished aboriginal rights or title notwithstanding that Canada, presumably for reasons of preserving its legal position, does not admit that fact in specific cases. The real question is whether the facts of this case as alleged can be said to constitute a specific claim. As we stated in the Kluane ruling:

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[552] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 60-61.
[553] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 10.
[554] *Frame v. Smith*, [1987] 2 SCR 99 at 136, Wilson J (dissenting).
[555] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 9.

> For the purposes of the present application regarding the scope of our mandate, it is unnecessary for the First Nation to *prove* or the Commission to *assume* the validity of aboriginal rights or title in the Park lands. In our view, it is sufficient to say that *the basis on which the claim is being put forward* is Canada's failure to consult the First Nation on the creation of the Parks or to compensate it for its loss. At this stage of the proceedings, we are concerned only with whether it is open to us to consider a claim of the type that the First Nation has placed before us, not with whether the First Nation has been able to fully establish its claim. That remains to be determined at a hearing on the merits, should such a hearing be required.[illegible]

The difference between the Kluane case and the present one is that we are now dealing with a claim on the merits. Nevertheless, in this case, we have no doubt that the Esketemc are aboriginal people, and that they resided in the Alkali Lake area and used those lands to gain their livelihood before settlers arrived. These facts appears to have been recognized by Reserve Commissioner Peter O'Reilly when, after setting apart IR 1 at Alkali Lake, he wrote on November 28, 1881, that "the reserve is hemmed in on the North, East, and South, by Mountains, and on the West by the Farm of Mr. Bowie; he pre-empted in 1861, and has since obtained his Crown grant; *his farm includes all the good land in the Valley as far as Alkali Lake, and should never*

[illegible] ICC, *Interim Ruling: Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 8–9.

have been disposed of until the Indian claims were defined."[557] Owing to the shortage of good land, Chief August reported in October 1893 that the Alkali Lake people had already been cutting hay for several years on unallocated Crown lands, where they had built houses and stables and had developed seven miles of access roads.[558] This situation was confirmed by Indian Agent Gomer Johns, who observed that "for several years they have 'put up' more hay on land outside of their Reserves than on their Reserves" and that "the disturbance caused by the intrusion of a white settler [William Wright] on a range practically enclosed by these 5 Reserves, will be a continual source of annoyance, besides the loss of pasturage *of which hitherto they have had a monopoly*."[559] On his own tour of the area in the summer of 1894 to investigate the complaint regarding Wright's proposed pre-emption of a meadow drained and used by the Band, Indian Superintendent A.W. Vowell commented: "[O]n my way to the meadow above mentioned[,] several smaller ones were brought to my notice where different members of the band have for years been cutting hay ... as the amount of hay possible to obtain from their reserves is insignificant when compared with their requirements."[560] Presumably some of these meadows became the First Nation's IR 8 through 14 following O'Reilly's allocation of additional lands in 1895, but it seems clear from the testimony of band members before the McKenna-McBride Commission that their use of unsurveyed and otherwise unoccupied Crown lands for hay and pasturage continued and was still occurring when the Royal Commission visited the area in 1914. Indeed, even Ditchburn remarked on March 26, 1923, that "the Indians will not take kindly in having to give up *meadow lands which they have been using for a great number of years* and see them given to the white stock raisers."[561]

It seems equally clear that, like the dedication for park purposes of lands previously used by members of the Kluane First Nation, purchases and pre-emptions by white settlers as permitted by the colonial and provincial governments resulted in the Alkali Lake Indians being deprived of areas they had previously used and occupied. Still other lands may have been made unavailable because they were subject to grazing permits or haying leases. O'Reilly reported in 1881 that most of the good land in the area had already been acquired by settlers through purchase or pre-emption, and it will be recalled that, in the three years preceding O'Reilly's first visit, the Indians of Williams Lake, Alkali Lake, and Soda Creek, in agitating for the Commissioner's early attendance, had threatened to take back the purchased and pre-empted lands previously used by them.

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[557] Peter O'Reilly, Indian Reserve Commissioner, to Superintendent General of Indian Affairs, November 28, 1881 (NA, RG 10, vol. 3663, file 9803; BCARS B1391) (ICC Documents, pp. 89–90). Emphasis added.

[558] Chief August, Alkali Lake Band, to A.W. Vowell, Indian Superintendent, October 28, 1893 (ICC Documents, pp. 204–05).

[559] Gomer Johns, Indian Agent, to A.W. Vowell, Indian Superintendent, November 17, 1893 (NA, RG 10, vol. 3917, file 116524) (ICC Documents, pp. 206–11). Emphasis added.

[560] A.W. Vowell, Indian Superintendent, to Hayter Reed, Deputy Superintendent General of Indian Affairs, August 6, 1894 (ICC Documents, pp. 212–16).

[561] W.E. Ditchburn, Chief Inspector of Indian Agencies, to G.R. Naden, Deputy Minister of Lands, March 26, 1923 (ICC Documents, pp. 455–56). Emphasis added.

Although Canada in the course of this inquiry has not admitted the Esketemc First Nation's interest in IR 15, 17, and 18, it is evident from the foregoing evidence that the federal government's representatives in earlier years did not appear reluctant to recognize the long-standing use of meadow lands by band members. Even today we see no evidence of any denial by Canada that Alkali Lake people resided on and used the lands in question. In all the foregoing respects, the present claim corresponds with the Kluane matter, where we concluded that we had jurisdiction to hear the claim on its merits. Canada has not advanced any arguments that would cause us to change our minds on this point.

Nevertheless, Canada contends that aboriginal rights and title must be site-specific and proven, and relies on *Delgamuukw* to support its position. That argument may be correct, where the purpose is to assert *ownership* of territory and *jurisdiction* over it, as the Gitskan and Wet'suwet'en peoples sought to do in *Delgamuukw*, or to negotiate the *extinguishment* of such ownership and jurisdiction in exchange for concrete rights and benefits. But that is not what the Esketemc First Nation is attempting to do in this case. The First Nation has expressly stated that it is not claiming aboriginal rights or title through the specific claims process, and indeed it has tendered little evidence relating to the integral aboriginal practices of the Alkali Lake people on IR 15, 17, and 18 or definitive proof of prior, continuous, or exclusive use and occupation of IR 15, 17, and 18 by them vis-à-vis Europeans or other bands.

Rather, the First Nation is merely seeking relief in the form of reserves on lands in an area that it demonstrably used and occupied both before *and* after the declaration of British sovereignty over British Columbia in 1846 and subsequent European settlement in the Alkali Lake area starting in about 1861. It is seeking that relief on the basis that Canada's *conduct* in the disallowance of IR 15, 17, and most of 18 failed, in the First Nation's view, to satisfy the Crown's fiduciary obligations to the Esketemc people.

No doubt certain aspects of the First Nation's claim have their roots in aboriginal rights or title. In our view, however, that fact is not determinative of the Commission's ability to consider the claim, even though guideline 7 of *Outstanding Business* regarding the submission and assessment of specific claims states that "[c]laims *based on unextinguished native title* shall not be dealt with under the specific claims policy."[562] We commented as follows in the Kluane interim ruling:

> In our opinion, where a claim involves a grievance arising out of Canada's *conduct* in a specific, isolated incident, the presence of unextinguished aboriginal rights or title is merely *incidental* to the overall claim. In such circumstances, in our view, the claim cannot be said to be *based on* unextinguished aboriginal rights or title and will not fall within the exclusive purview of the Comprehensive Claims Policy. The very essence of the Specific Claims Policy is the resolution of these types of historical grievances.
>
> Historical grievances of this nature are to be distinguished from cases in which the parties are exchanging undefined aboriginal land rights for concrete rights and benefits. In such cases, which turn on *the existence and content of aboriginal rights or title*, the claims can be said to be "*based on* unextinguished native title" within the meaning of guideline 7, and on this basis they lie *outside* the Specific Claims Policy – meaning that the comprehensive claims process is clearly at play. Such claims are based upon unextinguished native title because they involve, at least to some extent, the surrender or relinquishment of all or some aspects of the First Nation's undefined aboriginal land rights – including perhaps the First Nation's traditional use and occupancy of some parts of the land – in exchange for the sort of concrete rights and benefits contemplated by agreements like the Yukon Umbrella Agreement and its band-specific final agreements.[563]

Even if the tests for aboriginal rights and title have *not* been met, we are satisfied that the Esketemc people have made out a *prima facie* case for a pre-existing legal right to the lands in question, or at least a practical interest in those lands. First, they have demonstrated *use* and *occupation* of IR 15, 17, and 18 before and for many years after the arrival of the McKenna-McBride Commission.

Second, clause 8 of the terms of reference of that Commission protected from pre-emption or sale by British Columbia "any lands over which they [the province] have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians."[504] Clause 8 created temporary reservations of land pending a final decision by the two governments regarding reserves, and in this respect protected those lands for the Indians, although it must be acknowledged, without deciding the point, that, standing alone, the provision may not have gone so far as to convey to the Indians of Alkali Lake or elsewhere any positive right to use and occupy the lands for which they were applying or to exclude others from doing so.

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[562] *Outstanding Business*, 30, reprinted (1994) 1 ICCP 171 at 184. Emphasis added.
[563] ICC, *Interim Ruling – Kluane First Nation Inquiry: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000), 25.

Third, British Columbia's *Land Act* of 1911 recognized and protected Indian reserves and *settlements*:

> **7.**(1) Except as hereinafter mentioned, any person being a British subject, and further being –
>
> (a) The head of a family;
> (b) A widow;
> (c) A feme sole who is over eighteen years of age and self-supporting;
> (d) A woman deserted by her husband;
> (e) A woman whose husband has not contributed to her support for two years;
> (f) A bachelor over the age of eighteen years, –
>
> may, for agricultural purposes only, pre-empt any tract of unoccupied and *unreserved Crown lands, not being an Indian settlement*, and not exceeding one hundred and sixty acres in extent ...
>
> **34.**(1) Every person desiring to purchase unsurveyed, unoccupied, and *unreserved Crown lands, not being an Indian settlement*, shall first place at one angle or corner of the land to be applied for a legal post, and upon such post he shall inscribe his name and the angle represented thereby ... and shall cause a written or printed notice to be posted thereon, giving a description in detail of the length and direction of the boundary-lines of the land sought to be purchased and date of location, and of his intention to apply for permission to purchase the said land ....[505]

Section 7(1) was amended in 1918 to allow the prescribed individuals to pre-empt "any tract of *surveyed* unoccupied and unreserved Crown lands, not being an Indian settlement,"[506] but we do not consider the requirement of survey to have impaired in any way the protection of Indian reserves and settlements.

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[504] Memorandum of an Agreement arrived at between J.A.J. McKenna, Special Commissioner appointed by the Dominion Government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, as Premier of the Province of British Columbia, September 24, 1912 (ICC Documents, pp. 258–59).

[505] *Land Act*, RSBC 1911, c. 129, ss. 7 and 34. Emphasis added.

[506] *Land Act Amendment Act*, SBC 1918, c. 13, s. 3.

In the Commission's inquiry into the Aupe IR 6 and 6A claim of the Homalco Indian Band, counsel for Canada provided the following assistance in understanding the meaning of the term "settlement":

> Mr. Becker: The term "settlement lands" is in fact a term that was used in provincial legislation to deal with lands that were being used by Indians, and the term is not defined in the provincial legislation, but the idea was that no one can pre-empt lands that are settlement lands. There should not be any Indian settlement lands within a pre-emption.
>
> ...
>
> THE CHAIRPERSON: Just to conclude this part of the discussion then, explain to me when you talk about settlement lands what you thought was intended to be in fact settlement lands ...
>
> Mr. Becker: Our position in terms of the meaning of "settlement lands" are those lands that are actively being used by the band either as areas of cultivation, graveyards, areas where they are residing, basically areas of active use by the band that probably would not extend to areas where they would go to hunt or to trap in terms of – that would encompass a much wider area. We're talking about areas that they were settled on and actively using.[567]

We also had regard for the following comments of Superintendent General Frank Oliver on April 26, 1911, in introducing the proposed amendments to section 37A in the House of Commons:

> This legislation made it possible to facilitate the removal of settlers from lands that were held as Indian reserves. *We have found, however, that Indians in occupation of lands that are not specially reserved have not the protection it is desirable they should have.* In the Yukon there are no reserves, and the efforts of the missionaries and others are directed to getting the Indians to enter on the permanent occupation of the land, and we think it is right they should have that protection which this amendment proposes to give them.[568]

As we noted in the Homalco report, we believe that the Minister's reference to reserves in Yukon was intended as an example and not as a geographical limitation on the operation of the legislation. In any event, in that case, the Commission was dealing with a pre-emption of an Indian school and graveyard, and we concluded that the lands were occupied and formed part of an Indian settlement.

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[567] ICC, *Inquiry into the Claim of the Homalco Indian Band – Aupe Indian Reserves No. 6 & 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89 at 155.

[568] Canada, House of Commons, *Debates*, April 26, 1911, 7825, 7867.

Subsequently, in our report on the McKenna-McBride application claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band, we discussed the meaning of the term "Indian settlement" in the context of the prohibition in section 56 of the provincial *Land Act* against granting timber licences "in respect of lands forming the site of an Indian settlement or reserve." After noting that the term "Indian settlement" is not defined in the statute, we reviewed the parties' submissions on the issue before concluding:

> Given the limited amount of information available to us on this inquiry, we do not purport to offer any exhaustive definition of the term "Indian settlement." However, as we see it, when section 56 was enacted it is likely that the legislature intended to protect at least those lands for which there was some investment of labour on the part of the Indians – which could include village sites, fishing stations, fur-trading posts, clearings, burial grounds, and cultivated fields – regardless of whether they were immediately adjacent to or in the proximity of other dwellings. Furthermore, in our view, it was not strictly necessary for there to be a permanent structure on the land for it to constitute an "Indian settlement," providing there is evidence of collective use and occupation by the Band.[569]

The parties in the present inquiry have presented no arguments on whether IR 15, 17, and 18 would have constituted "Indian settlements" within the meaning of sections 7 or 34 of the *Land Act*. However, the evidence presented to the McKenna-McBride Commission suggests that IR 15 and 17 were used and occupied by the Band before 1914 for agricultural or ranching purposes, and for seasonal or year-round residential uses by some individuals; IR 18 was desired to connect the Band's existing reserves and to provide a source of firewood.[570] We have learned from the elders in the present inquiry that IR 18 was also used and occupied for residential and pastoral purposes. Band members testified that they had cleared, cultivated, irrigated, and erected houses, barns, sheds, stables, corrals, stackyards, and fencing on IR 15 and 17, and had cut hay and pastured their livestock there. Given the evidence, we find that the Band's members had used and occupied IR 15, 17, and 18, and had invested labour to the extent that the land's physical limitations would permit, such that IR 15, 17, and 18 should be considered settlement lands within the meaning of the provincial *Land Act*.

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[569] ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 248.

[570] Ashdown H. Green, BCLS, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, January 10, 1916, NA, RG 10, vol. 11064, file 33/16, part 2 (ICC Exhibit 11, tab 5).

We conclude that, even if the Esketemc people did not have a *reserve interest* in IR 15, 17, and 18, the First Nation *has* established, by virtue of use, occupation, and the terms of the *Land Act*, a sufficient *pre-existing legal interest* in the lands in the form of an Indian settlement that, in our view, the burden of proving that they did *not* have a legal interest in the lands should now be considered to have shifted to Canada. Canada has not tendered any evidence, however, to rebut the *prima facie* case made out by the First Nation regarding its pre-existing legal interest, and accordingly we find in favour of the First Nation on this issue.

Before considering whether any fiduciary obligations arose out of the First Nation's pre-existing legal interest, we must address Canada's second defence – that reserve creation is an exercise of a public law duty that does not generate fiduciary duties.

(b) Public or Private Law Duty

Another basis on which Canada denies fiduciary obligations to the Esketemc First Nation on the facts of this case is that, in creating and adjusting reserves through the actions of the McKenna-McBride Commission, the review by Ditchburn and Clark, and approval by the Governor General in Council, the federal government was taking legislative and executive action. Counsel then relies on the following excerpt from the decision of Rothstein J in the *Fairford First Nation* case in support of the proposition that, where the Crown acts pursuant to legislative or executive action, it is exercising public law duties, which are beyond the scope of review by the Commission:

> [D]uties that arise from legislative or executive action are public law duties. Such duties, as Dickson J. has said, typically do not give rise to a fiduciary relationship. Actions taken by the Indian Affairs Branch at the relevant time arose under and by reason of the *Indian Act* and section 5 of the *Department of Citizenship and Immigration Act*, 1952 R.S.C., c. 67. The *Indian Act* is replete with references to government involvement in virtually every aspect of the administration of Indian interests and the welfare of Indians.... There is no doubt that under these Acts, the Crown, through its Indian Affairs Branch, and later, its Department of Indian Affairs and Northern Development, over many years was active in its dealings with the Fairford Band. However, the actions taken by the Indian Affairs Branch arose under and by reason of the *Indian Act* and the *Department of Citizenship and Immigration Act* and were public law duties. ***There is no indication they would be in the nature of private law duties such as when Indian land is surrendered***. Nor is there any suggestion the Crown was exercising a discretion or power for or on behalf of the Indians. For these reasons, course of conduct by the Crown in its dealings with and for the Indians

> under these Acts generally, may not be relied upon as a basis for the creation of a fiduciary duty upon the Crown....[571]

Canada further relies on *Scrimbitt v. Sakimay Indian Band*, a judicial review application in which a band member contested the band council's decision to refuse her the right to vote in a band council election. MacKay J of the Federal Court, Trial Division, applying the *Fairford First Nation* case, found that the band's duty to administer its band list derived from the *Indian Act* and was thus a public law duty arising under legislation, not a fiduciary duty.[572] Similarly, in *Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)*, Rothstein J on behalf of the Federal Court of Appeal found that the decision of an administrator to disclose band council resolutions, correspondence, and minutes of band council meetings under the federal *Access to Information Act* did not constitute a breach of fiduciary duty, although some of the documents dealt with aboriginal land. He stated:

> The second argument is that the Government of Canada has a fiduciary duty to the appellants not to disclose the information in question because some of it relates to Indian land. We are not dealing here with the surrender of reserve land, as was the case in *Guerin v. The Queen*.... Nor are we dealing with Aboriginal rights under section 35 of the *Constitution Act, 1982*. This case is about whether certain information submitted to the government by the appellants should be disclosed under the *Access to Information Act*. The government is acting pursuant to a public law duty. Fiduciary obligations do not arise in these circumstances.[573]

Canada contends that reserve creation in British Columbia was conducted at senior levels of the federal and provincial governments, involving a Commission established by Orders in Council as well as government representatives like Ditchburn and Clark who were appointed pursuant to the *British Columbia Indian Lands Settlement Act* and the *Indian Affairs Settlement Act*. Their actions were approved by Order in Council and involved "difficult political negotiations" not capable of being supervised by the courts.[574]

In further support of its position, Canada cites the definition of "public law" in *Black's Law Dictionary*, which provides in part as follows:

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[571] *Fairford First Nation v. Canada (AG)*, [1999] 2 CNLR 60 at 89–90 (FCTD).

[572] *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 CNLR 205 at 218 (FCTD).

[573] *Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)*, [1999] FCJ No. 1822 (FCA) at 2.

[574] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 63.

> **Public law.** A general classification of law, consisting generally of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another. An act which relates to the public as a whole. It may be (1) general (applying to all persons within the jurisdiction), (2) local (applying to a geographical area), or (3) special (relating to an organization which is charged with a public interest).
>
> That portion of law that defines rights and duties with either the operation of the government, or the relationships between the government and individuals, associations, and corporations.[575]

We note that *Black's Law Dictionary* also defines "private law" in these terms:

> **Private law.** That portion of the law which defines, regulates, enforces, and administers relationships among individuals, associations, and corporations. As used in contradistinction to public law, the term means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals.[576]

In response to these submissions, the First Nation takes the position that there are three areas where fiduciary obligations clearly arise in relation to Indian interests in land: first, as Dickson J established in *Guerin*, where a reserve may be surrendered or dealt with in some other way that could be adverse to the Indians' interests; second, in dealing with aboriginal rights and title; and, third, according to the Commission in the 'Namgis First Nation's Cormorant Island inquiry and Rothstein J in the *Fairford First Nation* case, in the reserve creation process.[577] In regard to the latter case, the First Nation relies on a different passage from that quoted by counsel for Canada as "a complete answer to Canada's submissions respecting the test to be applied in relation to whether ... the reserve creation process was a public or private law duty."[578] In that passage, while addressing Canada's alleged breach of fiduciary obligation for failing to deal in a "timely or appropriate fashion" with deficiencies in an agreement negotiated directly between the Fairford

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[575] *Black's Law Dictionary*, 6th ed. (St Paul, Minnesota: West Publishing Co., 1990), 1230.

[576] *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing Co., 1990), 1196.

[577] ICC Transcript, September 26, 2000, p. 164 (Stan Ashcroft).

[578] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 8.

First Nation and the Province of Manitoba to provide the First Nation with alternative reserve lands to replace certain reserve lands that had been flooded. Rothstein J wrote:

> I think that when Canada received the compensation agreement from Manitoba in early 1977, it assumed a role as a fiduciary in relation to the Band. Indeed, it was Canada's position that the Band could not be a party to the agreement. It was Canada that had the unilateral authority to ratify the agreement. The usual circumstance in which Canada has been found to act in the role of a fiduciary is with respect to the surrender of reserve land. What gives rise to the fiduciary duty is the discretion vested in Canada to deal with surrendered land and the vulnerable position of the Indian band once it has surrendered the land. *The same conditions apply when land is to become part of an Indian reserve. The legal title to the land is to be vested in Her Majesty in right of Canada and the land is to be set apart by Her Majesty for the use and benefit of a band of Indians. Her Majesty must agree to take title to the land on specified terms and conditions. Once the band of Indians asks that the land become part of the reserve and places the matter in Canada's hands, it becomes completely vulnerable. It is reliant on Canada to agree with the party providing the land as to the terms upon which the land is provided and to carry out the transaction. As with surrendered land, when land is to become part of a reserve, the Crown is interposed between the party providing the land and the Indian band to protect the band from making an improvident transaction. Because the transaction involves land that is to become Reserve land, the Crown's obligation to the Band is not a public law duty but is in the nature of a private law duty* (*Guerin, supra*, page 385.) Accordingly, I conclude that Canada acts in a fiduciary capacity with respect to the Indian band in such circumstances.[579]

In reply, counsel for Canada simply contends that this passage from *Fairford First Nation* does not assist the Esketemc case because Rothstein J was dealing with compensation for damage to *existing* reserves whereas "the Alkali Lake Band ... never had a reserve interest in the lands at issue in the present claim."[580]

With respect, we disagree with Canada's position on this issue. Like the portion of the *Fairford First Nation* case on which the Esketemc First Nation relies, the present case involves Canada's responsibilities and obligations with regard to proposed *additions* to *existing* reserves. In neither that case nor the present one did the band have a reserve interest in the lands to be added to the reserve, but in both cases the provincial and federal governments each recognized that the band in question deserved additional reserve land. We believe that the comments of Rothstein J relied upon by the First Nation are directly on point and not distinguishable.

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[579] *Fairford First Nation v. Canada (A.G.)*, [1999] 2 CNLR 60 at 133 (FCTD). Emphasis added.

[580] ICC Transcript, September 26, 2000, p. 133 (Michael Mladen).

We have considered the dictionary definitions of "public law" and "private law" and acknowledge that, on first reading, they might appear to support a conclusion that the relationship between the Crown and aboriginal peoples would give rise to public law duties. However, on this point Dickson J in *Guerin* appears to have contemplated the problems with relying on conventional dictionary definitions in a *sui generis* context when he wrote:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, *the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this* sui generis *relationship, it is not improper to regard the Crown as a fiduciary.*[581]

In short, Dickson J confirmed that Canada's duties in the reserve *surrender* process are fiduciary and in the nature of private law duties, and we see no reason why the duties in the parallel but opposite process of reserve *creation* should not likewise be fiduciary on the grounds enumerated by Rothstein J. Certainly the reserve creation process was *itself* created by legislative and executive action, as Canada contends,[582] but in this sense it is the same as the surrender process. More important, however, is the recognition by Dickson J in *Guerin* that the Indian *interest in land* is the same, regardless of whether the subject is reserve land or the "unrecognized aboriginal title in traditional tribal lands";[583] that interest is an independent, *sui generis* legal interest created by neither the legislative nor the executive branches of government, and therefore the Crown's obligation to the Indians with respect to that interest is not a public law duty.[584]

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[581] *Guerin v. The Queen*, [1984] 2 SCR 335 at 385, Dickson J. Emphasis added.

[582] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 62.

[583] *Guerin v. The Queen*, [1984] 2 SCR 335 at 379, Dickson J.

[584] *Guerin v. The Queen*, [1984] 2 SCR 335 at 385, Dickson J.

We turn now to Canada's third defence – that a breach of fiduciary obligation implies deceit, dishonesty, or fraud.

(c) Deceit, Dishonesty, or Fraud as Condition of Fiduciary Breach

Given that Southin J in *Girardet v. Crease & Co.* stated that "an allegation of breach of fiduciary duty carries with it the stench of dishonesty – if not of deceit, then of constructive fraud,"[585] Canada submits that there is nothing in the evidence in this inquiry to suggest that Canada's representatives acted dishonestly or deceitfully. Rather, it appears, in counsel's view, that they sought to obtain as much land as possible for the Alkali Lake people, they "put up quite a fight for the reserves on the supplementary list," and they managed to prevent Wycott's Flat from being cut off as the McKenna-McBride Commission had recommended.[586]

The First Nation, for its part, focuses not on the fiduciary's dishonesty or deceit but on his failure to act loyally, prudently, and diligently on behalf of the beneficiary:

> In general terms a fiduciary is charged with a duty to act with reasonable care in performing the fiduciary's undertaking: *Maghun v. Richardson Securities of Canada* (1986), 58 O.R. (2d) 1 (C.A.). At the trial level in *Apsassin, supra*, (1987), 14 F.T.R. 161 at 207 (F.C.T.D.), Addy J. described the duty as "onerous", and one that demanded that "all reasonable efforts" be made on behalf of the Band. Thus it is submitted that where the Crown has a discretion to affect the vital interests of an aboriginal people in its reserve lands, whether they be *de jure* or *de facto*, the Crown has, at the very least, an obligation to exercise that discretion in a reasonable and prudent way. As Urie J.A. put it in *Kruger v. R.* (1985), 17 D.L.R. (4th) 591 at 647 (F.C.A.) the Crown's discretion must be "exercised honestly, prudently and for the benefit of the Indians". Madam Justice McLachlin put forward a similar formulation in *Apsassin, supra* at 230 when she stated that the "duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs'".[587]

The Commission is of the view that the facts in the *Guerin* and *Apsassin* cases demonstrate that a fiduciary's failure to act loyally, prudently, or diligently on his beneficiary's behalf is sufficient to give rise to a breach of fiduciary duty. In neither of those cases was it found that Canada's representatives had acted in their own interests or had sought to deceive the bands in question, but they were nevertheless held to have breached fiduciary responsibilities to their beneficiaries. In *Guerin*, the Crown did not go back and consult the Musqueam Band after failing to obtain a lease on the terms known to be acceptable to the band; instead, the government's representatives exercised their "discretion" by entering into a lease on less favourable terms. In *Apsassin*, although the Court concluded that no pre-surrender fiduciary obligations had been breached, it found that, in light of Canada's usual practice of retaining mineral rights when granting title to the surface, it had not been prudent for Canada to allow those rights to be given away inadvertently for no consideration when they had already demonstrated earning potential, however remote, and would have cost nothing to keep. Canada's failure to retain the mineral rights, or to take available steps to reacquire those rights, thus amounted to a post-surrender breach of fiduciary obligation.

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[585] *Girardet v. Crease & Co.* (1987), 11 BCLR (2d) 361 at 362 (SC).
[586] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 64.
[587] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, pp. 43–44.

Similarly, without invoking the degree of *mala fides* suggested by counsel for Canada, La Forest J in *Hodgkinson v. Simms* differentiated between the fiduciary duty and the "ordinary duty of care" by simply adding an additional layer of responsibility to the fiduciary's obligations:

> [T]he presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.[388]

We conclude from these authorities that, since fiduciary duties encompass the usual tort requirements of skill and competence, a simple failure by the fiduciary to exercise the requisite degree of skill and competence expected of him can amount to a breach of fiduciary obligation. A further finding of dishonesty, deceit, or fraud is not essential to establish a breach of fiduciary obligation. Accordingly, we find Canada's argument on this ground to be without merit.

Categories of Fiduciary Relationship and Tests for Fiduciary Obligation

We have already established that the fiduciary relationship between Canada and First Nations is "well settled" but that "not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation."[589] It then becomes necessary to identify the circumstances in which a fiduciary obligation will be found to arise.

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[388] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 405, La Forest J.

The Supreme Court of Canada in a series of cases – *Frame v. Smith*, *Lac Minerals Ltd. v. International Corona Resources Ltd.*,[590] *Hodgkinson v. Simms*,[591] and *Apsassin* – has identified two categories of fiduciary relationship. In the first category of "established" fiduciary relationships, there exists a rebuttable presumption that one party has a duty to act in the best interests of the other party. As La Forest J stated in *Lac Minerals Ltd. v. International Corona Resouces Ltd.*:

> The first [use of the term "fiduciary" relates to whether] . . . a certain class of relationship, custodial and non-custodial parents, was a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, although compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. *The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.*

In the second category of fiduciary relationship, the duty of one party to act in the best interests of the other is not presumed but may arise, depending on the facts of the case. With regard to this "fact-based" category, La Forest J stated:

> This brings me to the second usage of fiduciary . . . *The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected.* . . . It is in this sense, then, that the existence of a fiduciary obligation can be

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[589] *Quebec (AG) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183.
[590] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574.
[591] *Hodgkinson v. Simms*, [1994] 3 SCR 377.
[592] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 646-47, La Forest J. Emphasis added.

> said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship: see D.W. Waters, *The Law of Trusts in Canada*, 2nd ed. (1984), at p. 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.[593]

In the same four cases, the Court has also identified two tests for determining whether a fiduciary obligation arises in a given situation. The first, now referred to as the "vulnerability test," was originally developed by Wilson J in dissent in *Frame v. Smith*, where she stated:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses.... Yet there are common features discernable in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[594]

Subsequently, in *Lac Minerals*, a majority of the Court – Sopinka, McIntyre, and Lamer JJ – although finding that the evidence did not establish the existence of a fiduciary relationship, nevertheless adopted the fiduciary analysis of Wilson J in *Frame v. Smith*. According to Rothstein J in *Fairford First Nation*, Justice Wilson's "rough and ready guide" therefore became the authoritative test for identifying the characteristics of relationships in which fiduciary obligations will be imposed:

> In essence, it recognized that both a discretion or power on the part of the fiduciary and vulnerability on the part of the beneficiary, defined the fiduciary relationship. *Vulnerability was an essential requirement* and vulnerability meant that the beneficiary, despite his or her best efforts, was unable to prevent the injurious exercise of

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[593] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 648–49, La Forest J. Emphasis added.

[594] *Frame v. Smith*, [1987] 2 SCR 99 at 135–36, Wilson J (dissenting).

> discretion or power by the fiduciary and that other legal or practical remedies were inadequate or absent.[505]

At the same time, however, La Forest J in dissent in *Lac Minerals* developed a different test for determining the existence of fiduciary obligations. Under this test, which has come to be known as the "reasonable expectations test," the vulnerability of the class of beneficiary in question is a "relevant consideration" in "determining if new classes of relationship should be taken to give rise to fiduciary obligations." However, La Forest J also considered that, although vulnerability is often present in fiduciary relationships – and, when it is, it must be considered in determining whether the facts of the case give rise to a fiduciary obligation – it is not "a necessary ingredient in every fiduciary relationship."[506] He continued:

> Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm. It is clear, however, that fiduciary obligations can be breached without harm being inflicted on the beneficiary....
>
> I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. As I indicated above, *the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other.*[507]

In *Hodgkinson v. Simms*, La Forest J, this time speaking for the majority, clarified his reasons in *Lac Minerals* by categorizing fiduciary duty as "one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others." He reiterated that "vulnerability is not the hallmark of fiduciary relationship though it is an important *indicium* of its existence"; moreover, "while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty."[508] After referring to the three-step analysis of Wilson J in *Frame v. Smith* as a "useful guide" in determining "whether new classes of relationships are *per se* fiduciary," he continued:

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[505] *Fairford First Nation v. Canada (AG)*, [1999] 2 CNLR 60 at 84 (FCTD). Emphasis added.

[506] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 662, La Forest J.

[507] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 663, La Forest J. Emphasis added.

[508] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 405, La Forest J.

> As I noted in *Lac Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see at p. 648. *In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.* Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, *outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.*"[599]

According to Rothstein J in *Fairford First Nation*, with the release of *Hodgkinson v. Simms*, "for the first time, a majority of the Supreme Court [of Canada] found that the existence of a fiduciary duty depended, not on the existence and/or type of vulnerability defined by the majority in *Lac Minerals*, but on the ***reasonable expectations*** of the parties."[600] He added that the effect of the majority judgment of La Forest J in *Hodgkinson v. Simms*, coupled with the minority reasons of Iacobucci J – who, despite supporting La Forest J in finding a fiduciary duty, would simply have distinguished *Lac Minerals* on its facts – is that "*Lac Minerals* is still authoritative although it is not entirely clear to what type of cases."[601]

What precisely is the reasonable expectations test? From our review of *Lac Minerals* and *Hodgkinson v. Simms*, we conclude that it comprises the following factors

- In *Lac Minerals*, La Forest J stated that, "having regard to all the facts and circumstances, one party" – the beneficiary – "stands in relation to another" – the fiduciary – "such that it could reasonably be expected that [the fiduciary] would act or refrain from acting in a way contrary to the interests of [the beneficiary]."[602] In *Hodgkinson v. Simms*, he rephrased the issue as whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. He added that, outside the established categories of fiduciary relationships, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.[603]

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[599] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 409–10, La Forest J. Emphasis added.

[600] *Fairford First Nation v. Canada (A.G.)*, [1999] 2 CNLR 60 at 84 (FCTD).

[601] *Fairford First Nation v. Canada (A.G.)*, [1999] 2 CNLR 60 at 85 (FCTD).

[602] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 648 and 663, La Forest J. La Forest J relied in large part on P.D. Finn, "The Fiduciary Principle," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Agincourt, Ontario: Carswell, 1989), 64.

- Ascendancy, discretion, influence, vulnerability, trust, confidence, dependence, and industry practice are non-exhaustive examples of evidential factors to be considered in making out this expectation, but they will be important only to the extent that they evidence a relationship suggesting the first party is entitled to expect the other to act in his interests.[604] Vulnerability is *not* a necessary ingredient in every fiduciary relationship, although it will often be present and, if so, it must be considered in determining if the facts give rise to a fiduciary obligation.[605]
- The critical matter is the role the fiduciary has, or should be taken to have, in the relationship. He must be so implicated in the other's affairs or so aligned with the protection and advancement of the other's interests that foundation exists for the "fiduciary expectation."[606]
- The expectation may be *actual*, such as in the case of lawyers and investment advisors. Alternatively, it may be *judicially prescribed*, where, given the circumstances of the relationship, the law ordains it to be the beneficiary's entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would jeopardize its perceived social utility.[607]
- In the fiduciary context, power and discretion simply mean the ability to cause harm.[608] It is wrong, however, to focus on the degree to which a power or discretion to harm another is somehow "unilateral." This concept has neither descriptive nor analytical relevance to many *fact-based* fiduciary relationships. The relative degree of vulnerability does not depend on some hypothetical ability to protect oneself from harm but rather on the parties' reasonable expectations. A party who expects the other to act in the former's best interests is more vulnerable to an abuse of power than a

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[603] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 409, La Forest J.

[604] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 648, 656, and 659–62, La Forest J; *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 409, La Forest J.

[605] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 662–63, La Forest J.

[606] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 648, La Forest J.

[607] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 648, La Forest J.

[608] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 664, La Forest J.

party who should be expected to know that he or she should take protective measures.[609]

- In the professional advisory context, reliance does not require a wholesale substitution of decision-making power from the beneficiary to the advisor. Requiring such a wholesale substitution would simply be too restrictive and would ignore the peculiar potential for overriding influence in the professional advisor and the strong policy reasons favouring the law's intervention in appropriate circumstances by means of its jurisdiction over fiduciary duties. The reality of the situation must be looked at to see if the decision is effectively that of the advisor.[610]

The Supreme Court of Canada had the opportunity in *Apsassin* to revisit the question of fiduciary duties in the context of the Crown's relationship with First Nations. Although McLachlin J. who had concurred with the minority reasons of Sopinka J in *Hodgkinson v. Simms*, was not prepared to find that a pre-surrender duty had arisen in that case, she nevertheless concluded that a duty could, on proper facts, be "superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*" where a band had ceded or abnegated its decision-making power to or in favour of the Crown in relation to the surrender:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[611]

In summary, the Court in *Apsassin* concluded that, in the proper circumstances, the Crown might owe fiduciary duties to a band in the pre-surrender context – in particular, where the band's understanding of the terms of the surrender is inadequate, where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention, where the band has ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or where the surrender is so foolish or improvident as to be considered exploitative. The Court also found that fiduciary obligations could arise in the post-surrender context, where Canada inadvertently failed to retain the mineral rights or to take available steps to reacquire those rights.

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[609] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 412–13, La Forest J.

[610] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 432, La Forest J.

[611] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371–72, McLachlin J. Emphasis in original.

Neither Gonthier J nor McLachlin J entered into the debate that characterized the differences between Sopinka and La Forest JJ in *Lac Minerals* and *Hodgkinson v. Simms*. Nevertheless, in the opinion of Rothstein J in *Fairford First Nation*, the ceding of power contemplated by McLachlin J in *Apsassin* went hand in hand with her concurrence with Sopinka J in *Hodgkinson v. Simms* on the vulnerability approach – "an indication," according to Rothstein J, "although not conclusive, that in the Aboriginal context, one party ceding power to the other may still be a requirement in order for a fiduciary duty to arise."[612] In other words, the vulnerability test of Wilson J appears to have regained some of the lustre it lost following *Hodgkinson v. Simms*, although, in the wake of the additional jurisprudence grafted on it by Sopinka and McLachlin JJ in the latter case, and reiterated by McLachlin J in *Apsassin*, the test would now appear to read as follows:

- The vulnerable party must *cede* (voluntarily or involuntarily) its power over a particular matter to the party possessing power or discretion – the fiduciary – who then has scope for the exercise of that power or discretion.[613]
- In doing so, the vulnerable party places itself in the power of the fiduciary, who can thus *unilaterally* exercise its power or discretion to affect the vulnerable party's legal or practical interests.[614]
- By trusting or relying on the fiduciary to exercise that power or discretion with loyalty and care, the vulnerable party becomes *peculiarly vulnerable* to or at the mercy of the fiduciary, giving rise to a corresponding obligation

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[612] *Fairford First Nation v. Canada (AG)*, [1999] 2 CNLR 60 at 86 (FCTD).

[613] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 406, Sopinka and McLachlin JJ; *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371–72, McLachlin J.

[614] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 407–08, Sopinka and McLachlin JJ; *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371–72, McLachlin J.

in that fiduciary to exercise its power or discretion *solely for the benefit of the vulnerable party*.[615]

In the wake of these authorities, it is Canada's position that the reasonable expectations approach is more appropriate, given that the relationship between the Crown and the Indians is *sui generis* or unique and that, as Dickson J noted in *Guerin*, fiduciary obligations do not normally attach to the Crown.[616] Under this approach, according to counsel, the existence of an undertaking by the Crown giving rise to fiduciary duties is determined on the basis of a mutual understanding of both the Crown and the Indians that Canada has relinquished its own self-interest and agreed to act solely on behalf of the Indians; the existence of such an undertaking is fact specific.[617] In counsel's view, however, given the comments of Rothstein J in the *Fairford First Nation* case, neither the reasonable expectations approach nor the vulnerability approach has proven authoritative and, until the law is settled, Canada's conduct should be measured in light of both tests. Ultimately, Canada takes the position that, regardless of which test is applied, the First Nation has failed to establish that a fiduciary obligation was owed or is owing on the facts of this case, or that, if such an obligation did arise, Canada breached its obligation to the First Nation.

Because the First Nation takes the contrary position – that the Crown-aboriginal relationship falls within the "established" categories of fiduciary relationships – the criteria for establishing the existence of fiduciary obligations in the present case are, according to counsel, those identified by Wilson J in *Frame v. Smith*. Accordingly, in counsel's submission, the requirement for both parties to understand that one party has relinquished its own self-interest and agreed to act solely on behalf of the other does not apply since that is the test for fiduciary relationships *outside* the established categories, as the Commission previously held in its report on the Cormorant Island inquiry of the 'Namgis First Nation.[618] The only reason why Rothstein J in *Fairford First Nation* applied both tests, counsel suggests, is that the band in that case had conducted its own negotiations with the Province of

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[615] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 468, Sopinka and McLachlin JJ; *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371–72, McLachlin J.

[616] ICC Transcript, September 26, 2000, p. 136 (Michael Mladen).

[617] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 57.

[618] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, pp. 6–7 and 14; ICC Transcript, September 26, 2000, p. 179 (Stan Ashcroft).

Manitoba and was itself relying on the reasonable expectations approach.[619] Alternatively, even if the reasonable expectations approach were to be applied, the nature of the relationship and the surrounding circumstances determine what the parties would have reasonably expected: in this case, given Canada's conduct and representations, the Alkali Lake people, had they known that the Royal Commission's report was being reviewed and that some of the proposed allotments might be lost, should have been able to reasonably expect, in counsel's submission, that Ditchburn and Scott would have protected the allotments of land made by the McKenna-McBride Commission.[620]

In our view, the members of the Supreme Court of Canada agree on the two categories of fiduciary relationship and the presumptions associated with each. Where the members of the Court do not agree is on the test to be applied to determine whether, in the first or "established" category of fiduciary relationship, a presumed fiduciary duty is confirmed or rebutted, or, in the second or "fact-based" category, a fiduciary duty is proven or fails on the facts of the particular case. The authorities do not make clear whether there are two tests, with the vulnerability test applying to established fiduciary relationships and the reasonable expectations approach applying to fact-based fiduciary relationships, or just one test, the content of which remains unsettled. In *Fairford First Nation*, Rothstein J concluded that the two approaches "appear to be authoritative for different factual situations,"[621] but he nevertheless applied both approaches. Given his earlier conclusion that, "in the Aboriginal context, *one party ceding power to the other may still be a requirement* in order for a fiduciary duty to arise," Rothstein J may have believed that the Crown-aboriginal relationship falls within the established categories of fiduciary relationship such that the vulnerability approach should be employed. If so, the First Nation may be correct in suggesting that Rothstein J used *both* approaches because the Fairford First Nation itself chose to use the reasonable expectations test rather than the vulnerability approach.

We conclude, given Justice Iacobucci's affirmation in the *National Energy Board* case that the fiduciary nature of the relationship between Canada and First Nations is "well settled," that the Crown-aboriginal relationship falls within the first category of fiduciary relationship. In such circumstances, it will be presumed that Canada has a duty to act in the First Nation's best interests, subject to that presumption being rebutted on the facts.

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[619] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 7; ICC Transcript, September 26, 2000, p. 165 (Stan Ashcroft).

[620] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, pp. 14-15.

[621] *Fairford First Nation v. Canada (A.G.)*, [1999] 2 CNLR 60 at 86 (FCTD).

Canada places considerable emphasis on the fact that La Forest J in *Hodgkinson v. Simms* goes on to say that, "outside the established categories, what is required is evidence of a *mutual understanding* that *one party has relinquished its own self-interest and agreed to act solely on behalf of the other party*."[622] As for the requirement of a *mutual understanding* that the fiduciary will act solely in the interests of the beneficiary, it is important to remember that the expectation may be *actual* or, if the circumstances require, *judicially prescribed*. With regard to the *relinquishment of self-interest*, Canada contends that it did not agree to act solely on behalf of the Indians because it had a broad discretion in the reserve selection process in British Columbia to consider and needed to balance other interests against those of the Indians.[623] Given our conclusion that Crown-aboriginal relations fall within the established category of fiduciary relationship, it might appear easy to distinguish Justice La Forest's comments as applying only to fact-based fiduciary relationships. In light of the manner in which Sopinka and McLachlin JJ have fleshed out the vulnerability test as originally conceived by Wilson J, however, we must conclude that the fiduciary's obligation to act solely on behalf of the beneficiary applies equally in *both* tests. The essential difference between the two tests appears to be the requirement in the vulnerability test that the vulnerable party *cede* its decision-making power *absolutely* to the fiduciary so that the fiduciary becomes able to exercise its power or discretion unilaterally to affect the vulnerable party's legal or practical interests; the reasonable expectations test recognizes varying degrees to which decision-making power may be assumed by the fiduciary and instead focuses on the parties' reasonable expectations, given the degree to which the power has been transferred. We will return to Canada's argument that it was not acting solely for the people of Alkali Lake – and thus did not owe them a fiduciary obligation – when we apply these legal principles to the facts of this case below.

Despite our finding that the Crown-aboriginal relationship should be treated as falling within the established categories of fiduciary relationship, we must be mindful of the approach employed by Rothstein J in applying both tests to the facts before him. We will do the same. Before doing so, however, we must address Canada's contention that there is an additional criterion for finding a fiduciary obligation in a particular case: the existence of a *specific source* for that obligation.

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[622] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 409–10, La Forest J.

[623] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 85.

Sources of Fiduciary Obligation

Canada submits that fiduciary obligations owed by the federal government to First Nations must arise by statute, treaty, agreement, unilateral undertaking, or the common law of aboriginal title.[624] In the two 'Namgis inquiries and the McKenna-McBride application claim of the Mamaleleqala Qwa'Qwa'Sot'Enox Band, Canada relied on similar language in arguing that

> to have a fiduciary relationship which may give rise to a fiduciary obligation, the following three elements must be present:
>
> (a) *a statute, agreement or unilateral undertaking* to act for, on behalf of or in the interests of another person;
> (b) power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and
> (c) reliance or dependence by that person *on the statute, agreement or undertaking* and vulnerability to the exercise of power or discretion.[625]

In the two 'Namgis inquiries, this Commission held that these words do not apply where the first category of fiduciary relationship is involved; we considered the three-part analysis by Wilson J in *Frame v. Smith* to be the proper approach for determining whether a fiduciary obligation arises on the facts of a given case. In the Cormorant Island inquiry, we stated:

> In essence, [by importing the requirement of a statute, agreement, or unilateral undertaking,] Canada substitutes part of the *Guerin* analysis for the first characteristic in Madam Justice Wilson's "rough and ready guide," and then implies that this one amalgamated test must be satisfied for a fiduciary obligation to arise. We have difficulty with this approach for a number of reasons. First, the fact that Mr. Justice Dickson was careful to state in *Guerin* that he was making "no comment upon whether this description is broad enough to embrace all fiduciary obligations" indicates that he did not intend his remarks to form an exhaustive test. Second, Madam Justice Wilson did not include the criteria of "statute," "agreement," or "unilateral undertaking" in the first element of her "rough and ready guide" even though

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[624] Written Submission on Behalf of the Government of Canada, September 1, p. 54.

[625] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3 at 54; ICC, *Inquiry into the McKenna McBride Applications Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 109 at 168; ICC, *Inquiry into the McKenna McBride Applications Claim of the Mamaleleqala Qwe'Qwa Sot Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 250-51. Emphasis added.

> Mr. Justice Dickson's decision in *Guerin* was available to her when she wrote her decision in *Frame v. Smith*. We also note that in a more recent case, *M.(K.) v. M.(H.)*, Mr. Justice La Forest, after referring to Mr. Justice Dickson's reasons in *Guerin*, said that he "would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary."[626] Therefore, in our opinion, the proper approach in the circumstances of this claim is that set out in *Frame v. Smith*. In other words, the first element should be the "scope for the exercise of some discretion or power," and not the existence of "a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person."[627]

In the 'Namgis First Nation's McKenna-McBride application inquiry, we endorsed our reasons in the Cormorant Island claim, but in the Mamaleleqala inquiry we took a more fact-driven approach:

> As we discussed in those ['Namgis] inquiries, we are not convinced that every element of Canada's test must be satisfied in order for a fiduciary obligation to arise. Even if we were to accept Canada's proposed test, we are of the view that a fiduciary relationship exists between the Crown and the Band in the circumstances of this claim.[628]

On further reflection, we note that Dickson J in *Guerin* stated:

> Professor Ernest Weinrib maintains in his article "The Fiduciary Obligation," 25 U.T.L.J. 1 (1975), at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where *by statute, agreement, or perhaps by unilateral undertaking*, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[629]

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[626] *M.(K.) v. M.(H.)*, [1992] 3 SCR 6 at 63, La Forest J.

[627] ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3 at 56.

[628] ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 251.

[629] *Guerin v. The Queen*, [1984] 2 SCR 335 at 384, Dickson J. Emphasis added.

Similar language was used by La Forest J in *Hodgkinson v. Simms* when he wrote:

> More generally, relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are properly understood as simply a species of a broader family of relationships that may be termed *"power-dependency" relationships* ... [I]n my view *the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party.*[630]

In making this statement, La Forest J has identified "relationships characterized by a unilateral discretion, *such as the trustee-beneficiary relationship*" – clearly in the first category of fiduciary relationship – as "power-dependency relationships" involving "any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party." His comments in this context appear to speak to fiduciary relationships *generally*, and not in the sense of distinguishing the first category of fiduciary relationship from the second.

We do not disagree with Justice La Forest's view that fiduciary obligations arise by statute, agreement, conduct, or unilateral undertaking, but we do not necessarily believe that he was providing an exhaustive list of the sources of fiduciary obligation or suggesting that one of these four sources must be proven in each case. Indeed, even Canada in its submissions in the present case acknowledges that such obligations may arise by treaty or the common law of aboriginal title. The more important aspect of the statement, in our view, is the fact of one party being in a position of power or influence over the other, regardless of how that position arises. Even so, although we agree with Dickson J in *Guerin* and La Forest J in *Hodgkinson v. Simms* regarding the sources of fiduciary duty, we remain unconvinced that Canada's unorthodox formulation of the test for the existence of a fiduciary obligation as set forth in the 'Namgis and Mamalelegala inquiries was the correct one. We assume that Canada has come to the same conclusion, given its abandonment of that formulation in the present inquiry.

We will now consider whether, on the facts of this case, fiduciary obligations arose and, if so, whether they were breached.

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[630] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 411, La Forest J. Emphasis added.

Did Canada Owe Fiduciary Obligations to the Alkali Lake Band?

Positions of the Parties

The First Nation submits that, after the release of the report of the McKenna-McBride Commission, and given Canada's knowledge that the Alkali Lake people desperately needed more meadow lands, the federal government became subject to statutory and fiduciary duties to protect, preserve, and obtain formal reserve status for IR 15, 17, and 18 on behalf of the Band to ensure that its reasonable land requirements were satisfied. Whether the lands were reserves, the Band held an independent legal interest in them and, according to counsel, Canada should have "fought valiantly" to ensure that they were not disallowed in whole or in part – particularly since, given that the McKenna-McBride Commission had found the Band to have insufficient land, Canada was obliged to hold British Columbia to increasing the size of the Band's reserves.[651]

In counsel's submission, the purpose of the McKenna-McBride Commission, and later that of Ditchburn and Clark, was to ensure that the Indians had sufficient reserve lands to meet their needs.[652] When Ditchburn and Clark undertook their review, the Alkali Lake people, in the First Nation's view, needed the lands and had already been using and occupying them for a number of years. Moreover, all of IR 18 was required to join several small reserves for three reasons: to provide the Band with grazing areas of sufficient size, to prevent further pre-emptions from encircling the existing small reserves, and to preclude future intrusions by logging and non-aboriginal ranching interests. To disallow IR 15, 17, and 18, Canada had to establish some reasonable justification, but, in counsel's view, it failed to do so: IR 15 and 17 were rejected as "not reasonably required and ... interfering seriously with the development of the grazing facilities of the district," and most of IR 18 was simply denied without reasons. The First Nation contends that these conclusions were inconsistent with the earlier findings of the McKenna-McBride Commission and Ashdown Green.

In the First Nation's view, with the death of James Teit and the failure to replace him in the work of Ditchburn and Clark, the role of representing the interests of both Canada and the Indians fell to Ditchburn, subject to review and supervision by officials in the Department of Indian Affairs. In that role, Ditchburn had the unilateral discretion or power to decide whether to press for retention of IR 15, 17, and 18 for the use and benefit of the Alkali Lake Band.[653] By contrast, the Band was peculiarly vulnerable and in a position of "implicit dependency" because it could not legally or practically pre-empt or purchase land, it could not prevent the encroachment of settlers on its lands, and it was not consulted or given an opportunity to respond to the statements of Grazing Commissioner Thomas P. MacKenzie or local rancher C.E. Wynn-Johnson.[654] Indeed, according to counsel, because the Band was completely unaware of the review by Ditchburn and Clark, Canada should have been impressed with greater responsibility to see that the Band's interests were protected.[655]

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[651] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, pp. 45–47.

[652] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 64.

However, the First Nation submits that Ditchburn failed to act in a prudent fashion, resulting in a breach of fiduciary duty. He failed to consult the Band and, with "nary a comment in support of the Esketemc's requests," he accepted British Columbia's position that the Band had few cattle, it did not need additional grazing land, and the proposed allotments would create further scattered reserves and destroy the area as stock country. According to counsel, these statements were simply wrong and contrary to the findings of the McKenna-McBride Commission.[656] The First Nation further argues that Canada capitulated to pressure by British Columbia for Ditchburn and Clark to complete their review quickly, resulting in trade-offs and compromises being made to the benefit of some bands and to the detriment of others, such as Alkali Lake.[657]

From the First Nation's perspective, Canada was duty-bound, once it learned of the conflict between the findings of the McKenna-McBride Commission and the recommendations by Clark, to investigate and to consult the Band. Had Ditchburn done so, he would have learned that there was no basis for MacKenzie's recommendation or the underlying representations by Wynn-Johnson.[658] Moreover, senior officials in the Department of Indian Affairs were obliged to supervise Ditchburn's work to ensure that he "complied with the parameters of the authority granted to him" and to review his recommendations carefully "to ensure that he was correctly applying the policy as set forth in the instructions given to him."[659] Had Ditchburn or his superiors fulfilled their duties, "a very strong case could have been made with the Provincial Government and, almost certainly, a better result obtained."[640]

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[653] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, pp. 61–63.
[654] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, pp. 15–16.
[655] ICC Transcript, September 26, 2000, p. 42 (Stan Ashcroft).
[656] ICC Transcript, September 26, 2000, pp. 162–63 (Stan Ashcroft).
[657] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 49.
[658] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, pp. 47–49 and 64.
[659] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 64.

Canada takes a very different view of the facts in this case. Relying on statements by MacKenzie, Wynn-Johnson, and Indian Agents Ogden and A.O. Daunt, Canada contends that the evidence in this case does not establish that the Band had a desperate need for meadow lands.[641] At "official levels," in counsel's view, Canada and British Columbia agreed that IR 15, 17, and 18 were not "reasonably required" and thus decided to override the McKenna-McBride Commission's recommendations regarding the additional reserve lands required by the people of Alkali Lake.[642] According to counsel, the First Nation has not demonstrated that IR 15, 17, and most of 18 ever became reserves attracting statutory duties under the surrender provisions of the *Indian Act* when they were disallowed or reduced, nor has it shown how a trust responsibility might have arisen from the Crown's actions in this case.[643]

Canada further contends that the First Nation's case satisfies neither the reasonable expectations test nor the vulnerability test for establishing fiduciary obligations owed by the Crown to the people of Alkali Lake. In applying the former test, counsel argues that "there is no statute, agreement, conduct or unilateral undertaking indicating that there was a mutual understanding of both the Crown and the Band that Canada had relinquished its own self-interest and agreed to act solely on behalf of the Alkali Lake Band in the circumstances of this claim."[644] The Orders in Council establishing the reserve creation process were not statutes or agreements with the Indians but exercises of the royal prerogative; indeed, Canada acknowledges that, because the Band was not consulted in the development of the Orders in Council, Canada and the Band could not have had a mutual understanding that Canada had relinquished its own self-interest and agreed to act solely on behalf of the Band. Similarly, the Indians were not parties to the agreement of September 24, 1912, which was merely intended to resolve differences between the federal and provincial governments. Nor is there evidence, according to counsel, that the Alkali Lake people agreed to have the federal Crown represent their interests, or that such a relationship can be established by course of conduct. The fact that the people of Alkali Lake appeared and were given the opportunity to speak during the McKenna-McBride hearings suggests, from Canada's perspective, that the Band assumed responsibility for representing its own interests in the reserve allotment process and did not agree to have the federal Crown represent its interests.[645] Alternatively, counsel contends that the Allied Tribes assumed the role of representing the Band, as evidenced by the supplementary list of reserves proposed by that organization.[646] Finally, counsel submits that there is no evidence of an agreement that IR 15, 17, and 18 constituted reserves, that the Band would receive the lands, or that the federal Crown recognized the lands as reserves or administered them as reserves for the use and benefit of the Band.[647]

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[640] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 66.

[641] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 85.

[642] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 75; Written Submission on Behalf of the Government of Canada, October 17, 2000, p. 5.

[643] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 70–71.

[644] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 68.

Canada further contends that, even if the vulnerability test is the proper approach to determining the existence of fiduciary obligations, the First Nation has not satisfied the requirements of that test. Counsel maintains that there is no evidence of a statute, agreement, course of conduct, or unilateral undertaking whereby the Band ceded power to the Crown in relation to the lands. Furthermore, the federal government did not have the power or discretion, in counsel's view, to unilaterally affect the Band's practical or legal interests because reserve creation in British Columbia required the joint action of both the federal and the provincial governments. In any event, the reserve creation process did not result in adverse consequences to the Band, according to Canada, since it ultimately received a net increase in its reserve land base and its aboriginal rights – currently being negotiated before the British Columbia Treaty Commission – were not prejudiced. Counsel adds that the Band also retained its rights to sue for trespass or other interference with its land interests, indicating that it was not at the mercy of the Crown, as required by the vulnerability test.[648]

Even if Canada *did* have an obligation to represent the Band's interests, it would have been "redundant" for Ditchburn to discuss the disallowance of IR 15, 17, and 18 with the Band, according to counsel, since he possessed transcripts of the McKenna-McBride hearings and "was already aware of what the Band felt were their needs."[649] Counsel further contends that, if a duty arose, the duty was met by (1) approving the addition of IR 9A, 11A, 16, and a portion of IR 18 – a total of 1,123 acres – to the Band's reserve land base; (2) arguing, albeit unsuccessfully, for the retention of IR 15, 17, and the remainder of 18; (3) securing reversal of the McKenna-McBride Commission's recommendation to cut off Wycott's Flat – an additional 1,230 acres to the Band's benefit; (4) seeking to have W.W. Baer, who was "very well informed on Indian matters" and had "the confidence of Mr. Teit and his friends," replace Clark when the latter was temporarily reassigned; and (5) putting up "quite a fight" with the province for the addition to the Band's reserves of the 5,007 acres of land requested by the Allied Tribes in its supplementary list.[650] Moreover, Canada contends that its representatives were granted a broad discretionary authority under the *British Columbia Indian Lands Settlement Act* that did not preclude consideration of interests other than those of the Band.[651] The policy of creating additional reserves came into conflict with provincial grazing policies, which required Ditchburn and Clark to consider "how best to accommodate the interests of the aboriginal and non-aboriginal population in British Columbia."[652]

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[645] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 84.

[646] Written Submission on Behalf of the Government of Canada, October 17, 2000, p. 15.

[647] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 64–68.

[648] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 68–70.

[649] Written Submission on Behalf of the Government of Canada, October 17, 2000, p. 15.

The Duty to Ensure that the Band's Reasonable Land Requirements Were Met

After carefully considering the parties' positions on this issue, the Commission concludes, for the following reasons, that Canada owed the people of Alkali Lake a fiduciary obligation to ensure that their needs for reserve lands were met.

Under the terms of the McKenna-McBride Agreement of September 24, 1912, the Royal Commissioners were vested with power to review the existing reserves of Indian bands in British Columbia and to make recommendations to the federal and provincial governments as to how the acreages of those reserves should be adjusted. If the Commissioners were "satisfied that more land is included in any particular Reserve as now defined than is *reasonably required* for the use of the Indians of that tribe or locality," the reserve was, "with the consent of the Indians, as required by the Indian Act, [to] be reduced to such acreage *as the Commissioners think reasonably sufficient* for the purposes of such Indians." Alternatively, where the Commissioners found that insufficient land had been set aside for the use of a particular band of Indians, the Commissioners were to "fix *the quantity that ought to*

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[650] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 86–87; Written Submission on Behalf of the Government of Canada, October 17, 2000, pp. 19–22.

[651] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 85.

[652] Written Submission on Behalf of the Government of Canada, October 17, 2000, p. 17.

be added for the use of such Indians."[653] Federal Order in Council PC 3277 and provincial Order in Council 1341 adopting the agreement provided that "the Governments agree to consider favourably the reports, whether final or interim, of the Commission with a view to give effect, *as far as reasonably may be*, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings *as may be reasonably necessary* with the object of carrying into execution the settlement provided for by the agreement in accordance with its true intent and purpose."[654] In our view, these words convey some sort of obligation on Canada and British Columbia to give effect to the Commission's acts, proceedings, and recommendations "unless," in the words of counsel for the First Nation, "there was a very good reason for their not doing so."[655] The use of the word "reasonably" suggests that a decision *not* to adopt one of the Commission's recommendations did not simply fall within the respective discretions of the federal and provincial governments but rather was to be assessed *objectively*.

Canada subsequently enacted the *British Columbia Indian Lands Settlement Act* and British Columbia passed the *Indian Affairs Settlement Act*, under which Ditchburn and Clark were instructed to review the work of the McKenna-McBride Commission. The similar wording of section 2 of each statute provided that, "[t]o the full extent to which *the Governor [or Lieutenant Governor] in Council may consider it reasonable and expedient* the Governor [or Lieutenant Governor] in Council may do, execute, and fulfill every act, deed, matter or thing necessary *for the carrying out of the said* [McKenna-McBride] *Agreement* between the Governments of the Dominion of Canada and the Province [of British Columbia] *according to its true intent*, and for giving effect to the report of the said Royal Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province."[656] Although the *British Columbia Indian Lands Settlement Act* and the *Indian Affairs Settlement Act* spoke in terms of the Governor in Council and Lieutenant Governor in Council acting as they deemed "reasonable and expedient," they were nevertheless required to be faithful to the objectively framed "true intent and purpose" of the McKenna-McBride Agreement. Because the process of reserve selection ultimately grew out of the bilateral agreement between Canada and British Columbia as confirmed by Order in Council and legislation, Canada's obligation to the Alkali Lake Band may thus be said to have arisen as a matter of both unilateral undertaking and statutory prescription.

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[653] "Memorandum of an Agreement arrived at between J.A.J. McKenna, Special Commissioner appointed by the Dominion Government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, as Premier of the Province of British Columbia," September 24, 1912 (ICC Documents, pp. 238–45). Emphasis added.

[654] Order in Council PC 3277 (Canada), November 27, 1912 (ICC Documents, pp. 249–50); Order in Council 1341 (British Columbia), December 31, 1912 (ICC Documents, pp. 254–55).

[655] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 19.

[656] *British Columbia Indian Lands Settlement Act*, SC 1920, c. 51; *Indian Affairs Settlement Act*, SBC 1919, c. 32. Emphasis added.

Even if the agreement, Orders in Council, and legislation did *not* impose an objective standard of providing sufficient reserve land to meet the Indians' reasonable requirements but instead placed the matter of fixing the reserves in the *discretion* of the Crown, we must nevertheless consider this discretion in the context of the words of Dickson J in *Guerin*:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one...
>
> ... [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct...
>
> The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation....
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> ... [T]he Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have

> returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.[657]

In the present case, Canada must be taken to have known that the members of the Alkali Lake Band would have preferred the recommendations of the McKenna-McBride Commission over the scaled-back recommendations of Ditchburn and Clark. That knowledge should have similarly informed and confined Canada's discretion, thereby making it unconscionable for Canada to simply ignore the Band's position and proceed to allocate reserves on less favourable terms.

The next question we must consider is whether Canada's duty to ensure that the Band's reasonable reserve requirements were satisfied nevertheless fails to give rise to an obligation on the facts of this case, given the requirements of the vulnerability test and the reasonable expectations test. If an obligation did arise, we must also consider whether, in the circumstances, Canada's actions may be said to have reasonably satisfied that obligation.

(a) Vulnerability Test

Under the vulnerability approach, we consider, on the facts of this case, that any power or discretion the Band may have had to determine its reserves was ceded to the federal government. This cession took place involuntarily because Canada and British Columbia simply agreed between themselves that they would decide the matter; the Band had no say in deciding whether those lands would actually be made reserves. In this respect we have already found in the McKenna-McBride Agreement, the Orders in Council, and the *British Columbia Indian Lands Settlement Act* a statutory unilateral undertaking by the Crown to act for the benefit of the Indians of British Columbia. The Indians were not party to any of these instruments and thus were forced to rely on Canada to identify and preserve their interests.

We recognize that the Alkali Lake people were afforded an opportunity to make representations to the McKenna-McBride Commission, but that opportunity did not clothe them with any power to make decisions on their own behalf with regard to reserve selection. It was open to the McKenna-McBride Commission to recommend, over the objections of the bands involved, that lands be cut off from existing reserves, and in many cases bands in British

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[657] *Guerin v. The Queen*, [1984] 2 SCR 335 at 383–84 and 387–89, Dickson J.

Columbia were unhappy with the work of the Royal Commission because it did precisely that. In any event, it seems clear that even Canada acknowledged the shortcomings of the Alkali Lake Band's statements before that Commission, given Indian Agent Daunt's remarks, as reported to Ditchburn by Indian Agent E. MacLeod on July 5, 1927, "regarding the lack of proper representations being made to the Royal Indian Commission on behalf of the Alkali Lake Band."[658]

Nor could the Band's representations to the McKenna-McBride Commission be considered an effective submission to Ditchburn and Clark, given the failure of those two representatives of the federal and provincial governments to provide the Band with any chance whatsoever to respond to the statements of Wynn-Johnson and MacKenzie. Ditchburn and Clark were given broad powers of review over the work of the McKenna-McBride Commission, including the power to recommend additional cut-offs and, as in this case, the reduction of additions made by the McKenna-McBride Commission. Bands had no input and no recourse to these decisions, and accordingly we conclude that their power was effectively ceded *for them*, to paraphrase McLachlin J in *Apsassin*.

In the reserve selection process, then, we find that the Alkali Lake Band, like other bands in British Columbia, was completely at the mercy of the federal and provincial governments. In so saying, we again acknowledge Canada's point that it could not unilaterally set apart reserves in British Columbia since the proprietary jurisdiction over unreserved Crown lands resided with the province. However, Canada's inability unilaterally to set apart reserves, while true, is irrelevant and misleading with regard to whether it owed a fiduciary obligation on the facts of this case. Canada *was* vested with a unilateral power and discretion, but of a different sort: to decide whether simply to accept the denial or reduction of IR 15, 17, and 18 as proposed by Clark, or alternatively to consult the people of Alkali Lake and, if so directed, to formally disagree with Clark and actively pursue the retention of those lands. As Rothstein J stated in the *Fairford First Nation* case, where the band negotiated its own agreement but Canada was responsible for effecting the transfer of title and obtaining payment, Canada was subject to "a fiduciary duty ... to ensure that the best interests of the Band were protected *insofar*

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[658] E. MacLeod, Indian Agent, to W.E. Ditchburn, Indian Commissioner for British Columbia, July 5, 1927, NA, RG 10, vol. 11064, file 33/16, part 2 (ICC Exhibit 11, tab 3).

as Canada's unilateral discretion with respect to the transaction was concerned."[659]

The manner in which Canada exercised its unilateral power or discretion in the present case directly affected the Band's legal and practical interests by denying its members any recourse to Clark's recommendation and ultimately causing them to lose the use and occupation of their settlement lands. The evidence of the First Nation's elders indicates that the Band was eventually forced to vacate IR 15, 17, and the disallowed portion of 18, creating a great deal of uncertainty regarding the rights of band members to use and occupy those lands. Ultimately, the provincial government sold or leased portions of IR 18 to ranchers, and much of the three disallowed areas was logged out.

Finally, having concluded that the Alkali Lake Band was at Canada's mercy and thus peculiarly vulnerable to any decision the federal government might make with regard to reserve allocation, we come to the question of whether Canada as fiduciary was obliged to exercise its power or discretion *solely for the Band's benefit*. Canada suggests that the existence of other interests, and the need for it to balance those interests in allocating reserves to bands in British Columbia, means that it was not required to exercise its power or discretion in the Band's interest alone. In so saying, Canada relies on the statement of Rothstein J in *Fairford First Nation* regarding his finding that section 18(1) of the 1985 *Indian Act* did not burden Canada with fiduciary obligations in relation to its involvement in the study, approval, and financing of the Fairford River Water Control Structure:

> Finally, to find a fiduciary duty with respect to Canada's involvement with the Water Control Structure, would, I think, place a far broader scope on the obligation of the Crown than implied by subsection 18(1) or the relevant fiduciary duty and Aboriginal jurisprudence. It would place the government in a conflict between its responsibility to act in the public interest and its fiduciary duty of loyalty to the Indian band to the exclusion of other interests. In the absence of legislative or Constitutional provisions to the contrary, the law of fiduciary duties, in the Aboriginal context, cannot be interpreted to place the Crown in the untenable position of having to forego its public law duties when such duties conflict with Indian interests.[660]

If it were universally true that the existence of competing interests negates a finding that Canada is obliged to act solely in the best interests of a First Nation, we suspect that there would be almost no circumstances in which

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[659] *Fairford First Nation v. Canada (AG)*, [1999] 2 CNLR 60 at 119 (FCTD).
[660] *Fairford First Nation v. Canada (AG)*, [1999] 2 CNLR 60 at 92 (FCTD).

Canada could be said to owe a fiduciary obligation to a First Nation. Yet we see that the Supreme Court of Canada in *Guerin* and *Apsassin*, in the context of reserve surrenders, and even Rothstein J himself in *Fairford First Nation*, in a reserve creation situation, found that fiduciary obligations not only *existed* but also had been *breached*. Rothstein J held that a fiduciary must act with reasonable skill and diligence, and concluded that Canada had not met this standard because it failed in that case to act in a timely manner. An unusual complicating factor, however, was that the agreement proposed by Manitoba would have been an improvident transaction from the perspective of the Fairford First Nation, meaning that, although Canada was responsible for delay, "it was to the Band's benefit," according to Rothstein J, "that Canada did not ratify the agreement." Rothstein J continued:

> The issue then is whether, in not ratifying an improvident transaction to which the Band was prepared to agree, Canada is saved from a finding of breach of fiduciary duty on account of delay. I do not think so....
>
> *Canada may have been liable for breach of a fiduciary duty if it had proceeded to ratify an improvident transaction.* However, Canada is not free of fiduciary liability because it delayed in ratifying the transaction. That is because the delay is not related to the improvidence of the transaction. Canada seems to have been willing to go along with the agreement. The delay was attributable to confusion on the part of Canada as to how to proceed.
>
> *The duty of a fiduciary relates to the discretion that is to be exercised. That must include assessing the merits of the agreement from the point of view of the Indian band.* What Canada was required to do was to determine, in a timely manner, what, if anything, was improvident in the compensation agreement and advise the Fairford Band. That is the reason for Canada's role as a fiduciary, interposed between the third party (Manitoba) and the Fairford Band. As Isaac C.J.F.C. stated at page 25 [p. 263 C.N.L.R.] of *Semiahmoo, supra*:
>
>> I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfill this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct.[64]
>
> Of course, had Canada acted in a timely manner, it is not known whether Manitoba would have agreed to a transaction that was not improvident from the point of view of the Band. However, this does not absolve Canada from liability for delay. In *Guerin, supra*, Dickson J. states at page 388 [S.C.R.; p. 140 C.N.L.R.]:

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[64] *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 at 25, [1998] 1 CNLR 250 at 263 (CA)

> > When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed.
>
> That was the obligation on Canada in this case. In a timely manner, it should have determined that the compensation agreement was not acceptable, explained its reasons to the Band and sought instructions as to how to proceed. In not doing so, Canada breached its fiduciary duty to the Band.[662]

Similarly, in *Apsassin*, McLachlin J held that, although the band's decision to surrender was to be respected, Canada nevertheless would have been obliged to withhold its consent to the surrender if the band's decision had been so foolish or improvident as to constitute exploitation; if the transaction was not exploitative, there was no fiduciary obligation to withhold consent. She further held that the Crown had provided the band with information as to the options available to it and their foreseeable consequences. The result was that the decision to surrender could fairly be attributed to the band, refuting the argument that the band abnegated or entrusted its power over the surrender of the reserve to the Crown. In each of these examples, it seems clear on the facts as set forth by McLachlin J that, had Canada failed to take the *positive* steps it did – by providing band members with information to permit them to make an informed decision, and by reviewing the transaction to determine if it was exploitative – it left itself open to liability for breach of fiduciary obligation unless it could objectively establish at a later date that the transaction made sense from the band's perspective at the time. The subsequent review by the Supreme Court of Canada vindicated Canada's *pre-surrender* actions. In the *post-surrender* context, Canada failed to take positive, prudent steps to retain or reacquire the minerals rights, and it was held to be in breach of a fiduciary obligation. Similarly, in *Fairford First Nation*, federal officials failed to consult the First Nation regarding negotiations with the provincial government, prompting Rothstein J to conclude that Canada had breached its "fiduciary duty ... to protect the Band in its dealings with Manitoba."[663]

In the present case, the Band was not in a position to make its own decision, but Canada should still have obtained input from the Band to permit the federal government to make a proper decision on the Band's behalf. It was in this context that, although still able to consider other interests, Canada was required to put aside its own interest in achieving a global settlement with British Columbia, as well as the interests of white ranchers in securing additional grazing land, to ensure that it acted solely for the Band to identify and, to the extent possible, satisfy the Band's interests.

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[662] *Fairford First Nation v. Canada (A.G.)*, [1999] 2 CNLR 60 at 153–55 (FCTD). Emphasis added.
[663] *Fairford First Nation v. Canada (A.G.)*, [1999] 2 CNLR 60 at 149 (FCTD).

The point is that Canada cannot simply hide behind its obligation to consider competing interests as a justification for committing a First Nation to an exploitative transaction or for ignoring the interests of a First Nation. In *Apsassin*, McLachlin J held that Canada may in some circumstances find itself in a conflict of interest:

> The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157–59, and A.H. Oosterhoff, *Text, Commentary and Cases on Trusts* (4th ed. 1992). *The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.*[66]

In the present case, Canada faced virtually the same conflicting pressures: should it work to preserve IR 15, 17, and 18 for the people of Alkali Lake, who were already using and occupying those lands, or should it agree with British Columbia to allow those lands to be freed up to satisfy the grazing interests of ranchers like Wynn-Johnson? Clearly Canada stood to gain politically by allowing Clark's proposed disallowance and reduction of IR 15, 17, and 18 to proceed, thus clearing the way for an overall settlement with the province. However, based on the reasoning of Rothstein J in the *Fairford First Nation* case, it was necessary for Canada in these circumstances to scrutinize and assess, from the point of view of the Alkali Lake Band, the merits of Clark's proposal. It should also have informed the Band of the proposal, as well as possible alternatives and their respective consequences. Had Canada determined that the proposal was not acceptable to the Band, it should have sought instructions as to how to proceed. Alternatively, if the agreement was improvident, Canada's duty was to withhold its consent.

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[66] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 379, McLachlin J.

(b) Reasonable Expectations Test

In determining whether the facts of a particular case satisfy the reasonable expectations test, La Forest J in *Lac Minerals* and *Hodgkinson v. Simms* asked whether, having regard for all the facts and circumstances, one party could reasonably have expected the other party to act in the former's best interests with respect to the subject matter at issue. The critical question is the role Canada has, or should be taken to have, in the relationship with the Alkali Lake Band: was it so implicated in the Band's affairs or so aligned with the protection and advancement of the Band's interests that a foundation exists for what La Forest J (adopting the analysis of P.D. Finn in an article entitled "The Fiduciary Principle"[665]) referred to in *Lac Minerals* as the "fiduciary expectation"?

In our view, the answer must be a resounding yes. Given our finding that the arrangements for reserve allocation in British Columbia limited the Indians to representations before the McKenna-McBride Commission and excluded them from the actual decision-making process, we are driven to the conclusion that Canada, as the government responsible under section 91(24) of the *Constitution Act, 1867* for "Indians, and Lands reserved for the Indians," must be taken by the McKenna-McBride Agreement, by Order in Council PC 3277, by the *British Columbia Indian Lands Settlement Act*, and by its conduct to have assumed responsibility for protecting the Indian interest in reserve allocation. Accordingly, we find it reasonable for the people of Alkali Lake to have expected – the so-called fiduciary expectation – that Canada would act in their best interests.

In so saying, we are not ignoring Canada's arguments that the Alkali Lake Band made its own representations before the McKenna-McBride Commission or that the Band was represented by the Allied Tribes. We simply disagree that these arguments are, in certain respects, factually sound or, in others, legally probative.

We have already discussed our reasons for giving little credence to the Band's ability to make representations: it was not given the opportunity to respond to the statements of Wynn-Johnson and MacKenzie, nor was it permitted to participate in the decision-making process. As for Canada's supposition that the Allied Tribes represented the Band in the deliberations by Ditchburn and Clark, we note that in making this argument Canada has relied on Deputy Superintendent Scott's memorandum of October 29, 1923, as well as Ditchburn's letter of February 10, 1923, to British Columbia's Minister of Lands, T. Duff Patullo. We see nothing in Scott's letter, however, dealing specifically with the Alkali Lake Band or to suggest that it was represented by the Allied Tribes, and the existence of any relationship between the two groups was later placed in considerable doubt by the statements of lawyer Alec D. Macintyre before the Special Joint Committee of the Senate and House of Commons in 1927. As for the supplementary land requests made by Ditchburn on behalf of the Band, it seems clear that, although the Allied Tribes may have asked for the lands in the supplementary lists to be provided to the particular bands involved, the specific list for the Alkali Lake Band was prepared by Ditchburn himself on the basis of information supplied by the Indian agent:

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[665] P.D. Finn, "The Fiduciary Principle," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Agincourt, Ontario: Carswell, 1989), 1.

> The Alkali Lake Indians of this Agency have been for many years cutting hay for their stock from a number of meadows on vacant Crown lands and *the Agent therefore recommends that these be set aside for them.... The Allied Tribes Committee did not have the opportunity of visiting the Williams Lake Agency*.[666]

Canada submits that, if a fiduciary, tort, or other duty existed – which Canada denies – "it would have been to act diligently to negotiate the best deal possible in the circumstances."[667] Even this submission confirms, albeit somewhat backhandedly, Canada's view that, if there was negotiating to be done, it was Canada's job to do it. The entire tone of the historical documents, as well as Canada's written and oral submissions, reflects the government's perception that it, and it alone, should determine what was in the best interests of the Indians. In such circumstances, we believe it was reasonable for the members of the Alkali Lake Band to expect and to rely on Canada to act in their best interests.

It will be recalled that, outside the established categories of fiduciary relationship, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party, as prescribed by La Forest J in *Hodgkinson v. Simms*.[668] In this sense, we believe that recognition of Canada's control over the negotiating process was ***mutual*** to both the federal government and the Indians of Alkali Lake. But can it be said that both parties understood that Canada had relinquished its own self-interest and agreed to act solely on behalf of the Alkali Lake Band? Such a mutual understanding may not seem apparent, particularly in the case of the review by Ditchburn and Clark, of which the members of the Band appeared to be unaware. But as La Forest J noted in *Lac Minerals*, the fiduciary expectation, in addition to being *actual*, may be *judicially prescribed* where, "given the actual circumstances of the relationship," the law ordains it to be the beneficiary's entitlement "irrespective of whether [the fiduciary] has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility."[illegible] In the present case, although the people of Alkali Lake may not have been informed of the work being done by Ditchburn and Clark, it is our view that, given the federal government's unilateral discretion in the matter, they were nevertheless entitled to expect the work to be done in their best interests, just as they were entitled to expect it of the McKenna-McBride Commission.

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[666] W.E. Ditchburn, Chief Inspector of Indian Agencies, to T.D. Patullo, Minister of Lands, February 10, 1923, enclosing list entitled "Alkali Lake Band" (ICC Documents, p. 421).

[667] Written Submission on Behalf of the Government of Canada, October 17, 2000, p. 19.

[668] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 409, La Forest J.

Even if vulnerability is not a necessary ingredient for deciding whether a fiduciary obligation existed, it was present, as we have already discussed, in Canada's unilateral ability to decide whether to go along with Clark's position in the interests of political expediency or, alternatively, to defend and promote the Band's retention of IR 15, 17, and 18. In so saying, we acknowledge the comment of La Forest J that it is wrong to focus on whether Canada's power or discretion is somehow unilateral. We take this to mean that, even where a beneficiary has some say in the decision-making process or some ability to protect itself from harm, it may still be vulnerable depending on whether it should be expected to know that it should take protective measures. However, where, as here, the power or discretion actually *was* unilateral, we believe that the Band as beneficiary was as exposed to harm as it could be because, even if it had been aware that it should take measures to protect its interests, *there was nothing it could do.*

In these circumstances, no one *but* Canada could have protected the Band's interests. In our view, the reasonable expectations test has been met, and Canada was impressed with the same duties as those identified under the vulnerability test: (a) to scrutinize and assess, from the point of view of the Alkali Lake Band, the merits of Clark's proposal; (b) to inform the Band of the proposal, with information as to the alternatives and their possible consequences; (c) to seek instructions as to how to proceed, if the proposal was

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[illegible] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at 648, La Forest J, quoting from P.D. Finn, "The Fiduciary Principle."

not acceptable to the Band; and (d) to withhold consent, if the proposal was improvident.

(c) Defence of Reasonable Justification

We have concluded from the circumstances of the present case that the members of the Alkali Lake Band ceded to Canada absolutely, albeit involuntarily, any power they may have had over reserve allocation in the province, such that they were left vulnerable or at the mercy of the Crown's discretion in the reserve lands they ultimately received. We have also found that the circumstances gave rise to a reasonable expectation on the part of the people of Alkali Lake that Canada would act in a fiduciary capacity – that is, loyally, skilfully, and diligently in the best interests of the Indians – in the reserve allocation process.

The next question we must ask is whether, in exercising its fiduciary duties, Canada acted appropriately in the circumstances. Were the reserves ultimately allocated to the Alkali Lake Band *reasonable* in terms of quality and quantity? Was it *reasonable* for Ditchburn and Clark to deny or reduce the reserve land allocations recommended by the McKenna-McBride Commission?

Canada would answer each of these questions affirmatively, based on the statements of Indian Agent Isaac Ogden and local rancher C.E. Wynn-Johnson:

> 243. [T]he evidence does not demonstrate that the Band had a desperate need for meadow lands. The evidence provided to the McKenna-McBride Commission by Indian Agent Ogden indicates that the Alkali Lake Band were "pretty well to do Indians" and were "fairly well off" with respect to pasture land. The Indian Agent supported the Band's application for additional lands not because they were desperately needed by the Band but because he "thought they could raise more stock if they had a little more pasture land".... The evidence of the Indian Agent does not at all indicate that the pasture land was desperately needed by the Band....
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> 244. The evidence from the Provincial Grazing Commissioner Mackenzie ... indicated that the Alkali Lake Band's reserves were already large enough to hold their cattle. Evidence from C.E. Wynn-Johnson, Indian Agent Daunt and Mr. Clark... also indicated that the Alkali Lake Band did not need additional reserves and that they had sufficient hay lands on established reserves if they would cultivate them."[670]

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670 Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 85-86.

We have carefully reviewed the evidence given by Ogden before the McKenna-McBride Commission, but it is at best equivocal. In a letter to J.G.H. Bergeron, Secretary to the McKenna-McBride Commission, before the hearings regarding the Band's reserves, he wrote that "mostly all their land is not much use."[671] Although Ogden did say that the people of Alkali Lake were "pretty well to do" and "fairly well off" in terms of pasture land, he was presumably referring to acreage rather than quality because he also acknowledged that a "good deal" of the Band's land was "pretty rocky and steep with high side-hills," its pasture land was "pretty poor," and half the men in the Band did not have good reserve land. He further stated that some of the Band's reserve lands were not useful, that he thought "they ought to have other land that would be more suitable for them," and that he considered the Band's request for additional pasture land to be reasonable since it would permit band members to raise more stock. We find it troubling, however, that, in giving this evidence, he also admitted having no knowledge of IR 4, 5, 9, 10, 11, 12, 13, or 14 – eight of the Band's 14 existing reserves as of 1914.[672]

Wynn-Johnson's representations were also suspect. On November 10, 1922, he informed MacKenzie that "the Indians [of Alkali Lake] have practically no cattle, although they have a large number of useless cayuses." He added that the evidence given by Band members before the McKenna-McBride Commission would bear out his opinion that "they would [not] have any difficulty keeping their stock on their numerous reservations." Finally, he expressed concern that ranchers who had come to appreciate being able to "drift our cattle up that valley to the back country" would be opposed to allowing the Indians "to fence that valley" as it "would destroy this section as a stock country."[673]

Wynn-Johnson's information appears to have been doubtful in at least three respects. First, contrary to Wynn-Johnson's contention that the Alkali Lake had "practically no cattle," Chief Samson testified under oath before the McKenna-McBride Commission that the Band had about 100 head of cattle and some 350 horses. In Wynn-Johnson's opinion, the horses were nothing more than "useless cayuses," but they were obviously valued by the Band and had lesser pasture requirements since, according to Ogden, reducing the horses by 300 head would permit the cattle herd to be increased by roughly 175. In any event, the Band's need for grazing land seems to have been considerably more substantial than Wynn-Johnson's representations would have suggested.

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[671] Isaac Ogden, Indian Agent, Williams Lake Agency, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs in British Columbia, May 22, 1914, NA, RG 10, vol. 11020, file 512B (ICC Documents, p. 281).

[672] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, November 23, 1914 (ICC Documents, pp. 335 and 339-42).

[673] C.L. Wynn-Johnson to Thomas P. MacKenzie, Commissioner of Grazing, November 10, 1922 (ICC Documents, pp. 411-12).

Second, the evidence of band members before the McKenna-McBride Commission did not "bear out" Wynn-Johnson's opinion that they had sufficient land to maintain their stock. Chief Samson opened the hearings with a plea for more land, and the Royal Commissioners received *17* applications from the Band for additional lands *already being used* by the people of Alkali Lake. Moreover, as we have just discussed, Indian Agent Ogden confirmed that much of the Band's existing land was poor and that he considered the Band's request for additional lands to be reasonable. Similarly, surveyor Ashdown Green, who must be taken to have been more impartial in the matter than Wynn-Johnson, laid out additional reserves "to meet the necessary and reasonable requirements of the Indians ... the new allotments in their behalf to include only the meadows from which hay is cut, or which are otherwise utilized agriculturally."[674] In his report he noted in particular with respect to IR 17 that it included good meadows that were "of great assistance to the Indians, who are very short of feed for their stock."[675]

Finally, Wynn-Johnson suggested that providing the proposed additional reserves to the Band would result in the valley being fenced and ranchers being precluded from freely running their cattle through the area. There is no indication in the record, however, that the people of Alkali Lake intended to fence the reserves. The only evidence we have seen in this regard is a statement by Grazing Commissioner MacKenzie that the reserves should be fenced and the Indians required to hold their cattle and horses on their own lands.

Despite the shortcomings in Wynn-Johnson's comments, MacKenzie clearly took them to heart. In early 1923, Ditchburn had indicated in letters to Scott and Indian Agent A.O. Daunt that he did not anticipate much difficulty in obtaining large areas of grazing land for the Indians of the Williams Lake

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[674] C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, to Ashdown H. Green, BCLS, August 15, 1915, NA, RG 10, vol. 11020, file 512B (ICC Documents, p. 557).

[675] Ashdown H. Green, BCLS, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, January 10, 1916, NA, RG 10, vol. 11064, file 33/16, part 2 (ICC Exhibit 11, tab 5).

Agency,[676] based on his belief that the Grazing Commissioner was "fully in touch with the requirements in these sections of the country."[677] Even MacKenzie acknowledged that he had been thinking of allotting additional range to the members of the Alkali Lake Band if they could not comfortably keep their stock on their existing reserves.[678] However, in a file note, he subsequently referred to Wynn-Johnson's letter as "evidence that Indians [of Alkali Lake] have no cattle" and required no additional reserves. He also accepted at face value the rancher's complaint that providing the desired reserves would "practically mean that control of the summer ranges [would be] placed in the hands of the Indians who are grazing only useless horses," and decided that he would "not agree to the increase in further scattered reservations for the Indians."[679] This last comment seems particularly odd since one of the expressed purposes of IR 18 was to *join* a number of scattered reserves rather than create additional new ones.

Just as MacKenzie relied on Wynn-Johnson for information, it seems clear that Clark relied on MacKenzie for his recommendation on how to deal with interior grazing lands. There is no suggestion that Clark or Ditchburn visited Alkali Lake to obtain first-hand knowledge of the country, but the former in his final report, echoing MacKenzie's comments, recommended the disallowance of IR 15 and 17 on the basis of their "not being reasonably required and as interfering seriously with the development of the grazing facilities of the district."[680] Ditchburn confirmed that, just as had been done for the Shuswap, Columbia Lake, and St Mary's Bands of the Kootenay Agency, he and Clark had disallowed the suggestions of the McKenna-McBride Commission for the Alkali Lake Band "on the recommendation of Mr. MacKenzie, the Grazing Commissioner, it being contended that the granting of these reserves would interfere with the grazing interests of the white people."[681]

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[676] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, January 17, 1923, NA, RG 10, vol. 7784, file 27150-3-13, part 1 (ICC Documents, pp. 445-46); W.E. Ditchburn, Chief Inspector of Indian Agencies, to A.O. Daunt, Indian Agent, February 8, 1923, NA, RG 10, vol. 11062, file 33/16, part 1, reel T-16094 (ICC Exhibit 13).

[677] W.E. Ditchburn, Chief Inspector of Indian Agencies, to T.D. Pattullo, Minister of Lands, January 16, 1923, NA, RG 10, vol. 11040, file 33/General, part 5, reel T-16087 (ICC Exhibit 11, tab 6).

[678] Thomas P. MacKenzie, Commissioner of Grazing, to C.L. Wynn-Johnson, November 22, 1922 (ICC Documents, p. 451).

[679] Thomas P. MacKenzie, Grazing Commissioner, "In reference to recommendations of the Royal Indian Commission regarding establishment of proposed new reserves, Williams Lake Agency," undated, British Columbia Ministry of Lands, file 02676 (ICC Documents, pp. 453-54).

[680] J.W. Clark, Superintendent, Immigration Branch, to T.D. Pattullo, Minister of Lands, undated, British Columbia Ministry of Lands, file 02676 (ICC Documents, pp. 449 and 450).

[681] W.E. Ditchburn, Chief Inspector of Indian Agencies, to G.R. Naden, Deputy Minister of Lands, March 26, 1923 (ICC Documents, pp. 455-56).

Canada seems to suggest that the concurring reports of Ditchburn and Clark reflect their agreement that the reasonable land requirements of the people of Alkali Lake had been met. With respect, we believe this argument to be one of form over substance. Although we must acknowledge that Ditchburn and Clark were able to submit concurring recommendations and that, "at official levels," the federal and provincial governments both ratified those recommendations, it nevertheless seems obvious that Ditchburn and Clark had very different views of the Band's requirements. The evidence supports the First Nation's contention that, at least with regard to the Alkali Lake Band, Canada yielded to Clark's position in an effort to finalize the matter in a politically acceptable way. On March 11, 1923, in commenting on Clark's recommendation to disallow IR 15 and 17 and to reduce IR 18 from 3,992 acres to 640 acres, Ditchburn advised Scott that he had "registered objections but *this was the best I could get*."[682] Similarly, in 1925, Minister of the Interior Charles Stewart commented in the House of Commons regarding the implementation of the McKenna-McBride Agreement that "[w]e did not entirely satisfy the Indians or their representatives in the allocation of lands, but inasmuch as the provincial government were threatening to cancel the arrangement altogether if we did not take action, we thought it well to do something"; ultimately the federal government ratified the agreement and the Royal Commission's report.[683] These were hardly ringing endorsements of any consensus between Canada and British Columbia that the Indians' needs had been met.

Ditchburn further added that, if the Alkali Lake Band could be allotted new reserves from the supplementary list on "meadow lands ... which they have always been using," then he felt he "could with all confidence report that the British Columbia Government have gone as far as it is possible to go in meeting the reasonable requirements of the Indians and they should be satisfied."[684] Similarly, after Clark had issued a final report but before issuing his own, Ditchburn disagreed with the provincial assessment that additional meadow lands were not required because, in addressing the supplementary list of reserves, he stated that "it would be wise policy on the part of the Government of British Columbia to allow" the recommended reserves, including "some meadow lands for the Alkali Lake Indians which I am of the opinion it would be advisable to give part of if not all."[685] Clearly, the Band received *none* of the meadow lands on the supplementary list, and accordingly Ditchburn would seemingly have had to admit that the Band had no reason to be satisfied that its requirements had been met. This was acknowledged by Indian Agent E. MacLeod in a letter to Ditchburn on July 5, 1927, when, in light of fellow Agent A.O. Daunt's view that the Band had not been properly represented before the McKenna-McBride Commission, he remarked: "I am expecting some difficulty in the matter of the land situation of the Alkali Lake Band but that will have to be dealt with on its own merits when we come to it."[686]

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[682] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 11, 1923 (ICC Documents, pp. 424–25). Emphasis added.

[683] Canada, House of Commons, *Debates*, June 26, 1925, 4993–94; Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 241.

[684] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 11, 1923 (ICC Documents, pp. 427).

A parcel-by-parcel review of IR 1 through 14 in Appendix C, and of the additional lands applied for and approved by the McKenna-McBride Commission in Appendix D, amply demonstrates these shortcomings.[687] With the exception of the limited hay swamps and pasture areas on most of the reserves, the larger proportion of the land was rocky and steeply sloped or, if level, was covered by scrubby trees, suffered from alkaline soil or lack of water, or did not support cultivation because of its elevation and the attendant short growing season and high risk of frost. As Commissioner O'Reilly commented when setting apart IR 1 through 14, most of the good land had already been acquired by settlers through pre-emption, purchase, or lease, so the Indians were forced to accept the remaining, less desirable tracts. By way of contrast, IR 17, which was disallowed, was described as "generally ... good meadows that were of great assistance to the Band," and IR 15, although portrayed by Ashdown Green as containing a large proportion of brush, was not associated with the sort of negative comments that characterized most of the lands actually allotted to the Band. The quality of IR 18 is little discussed in the documents, although surveyor MacKay in 1926 described the approved 703 acres surveyed by him as wooded, the soil being "light and dry with occasional rock outcrops." In short, we are hard pressed to understand how it can be fairly concluded that Ditchburn and Clark reasonably disallowed or reduced IR 15, 17, and 18 or that Ditchburn gave Clark's recommendations the sort of scrutiny they required.

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[685] W.E. Ditchburn, Chief Inspector of Indian Agencies, to G.R. Naden, Deputy Minister of Lands, March 26, 1925 (ICC Documents, p. 457).

[686] E. MacLeod, Indian Agent, to W.E. Ditchburn, Indian Commissioner for British Columbia, July 5, 1927, NA, RG 10, vol. 11064, file 33/16, part 2 (ICC Exhibit 11, tab 5).

[687] Various individuals surveyed and otherwise assessed the Band's reserves and the other lands sought for it. The comments of these individuals illustrating the shortcomings of these lands are highlighted in italics in Appendices C and D.

The only offsetting consideration of which we are aware is the fact that the McKenna-McBride Commission proposed cutting off an existing reserve, IR 6 (Wycott's Flat), whereas Ditchburn and Clark recommended its reinstatement. This latter recommendation was approved and added 1,230 acres to the Band's landholdings, so might be considered as a reasonable replacement for the loss of IR 15, 17, and 18 if it replaced the utility of those lands. On this point, we note that, as early as 1881, Reserve Commissioner Peter O'Reilly had recommended that, because IR 6 required water to become a valuable farm, Canada should develop irrigation works on that land at government expense.[688] Nevertheless, by the time of the McKenna-McBride Commission hearings in 1914, IR 6 was considered to be of little use because it had been determined that it could not be irrigated: Chief Samson testified that the Band had spent two years attempting to bring water to the land but had been forced to abandon the project when Harper's Lake, the proposed source of the water, ran dry.[689] Indian Agent Isaac Ogden also remarked before the Royal Commission that, because of its elevation, IR 6 was very dry and, without water, would not prove useful for anything other than winter pasture.[690] In1923, however, Ditchburn reported that an engineer with the Dominion Water Power Branch had suggested that irrigation was "quite feasible by ditch and flume from Dog Creek";[691] this information apparently formed the basis for the recommendation to return IR 6 to the Alkali Lake Band. There is no evidence before us, however, to indicate that Canada ever took steps following Ditchburn's recommendation to assist the Band in developing irrigation works on IR 6. In these circumstances, given that IR 15, 17 and 18 were valued by the people of Alkali Lake for agricultural purposes, it seems doubtful, in our view, that the utility of those lands has been replaced by IR 6.

Ultimately, we must conclude that Ditchburn failed to investigate Clark's proposal and MacKenzie's recommendation to confirm the veracity of the information supplied by Wynn-Johnson. That information, as we have observed, was dubious in terms of both motive and content. If there was agreement between Ditchburn and Clark with regard to the reserves of the

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[688] Peter O'Reilly, Indian Reserve Commissioner, to Superintendent General of Indian Affairs, November 28, 1881, NA, RG 10, vol. 3663, file 9803, BCARS, B1391 (ICC Documents, pp. 91-92).

[689] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, July 10, 1914 (ICC Documents, p. 287).

[690] Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, November 23, 1914 (ICC Documents, pp. 317 and 338).

[691] W.E. Ditchburn, Chief Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, March 27, 1923 (ICC Documents, p. 447).

Alkali Lake Band, it existed simply because Ditchburn did not fulfill his fiduciary obligation to the Band to scrutinize and assess the merits of the proposal from the point of view of the Band. He did not even inform the Band that the recommendations of the McKenna-McBride Commission were being reviewed, much less suggest possible alternatives and their respective consequences or solicit the Band's instructions as to how to proceed. It is true that Ditchburn and Scott initially on several occasions entreated British Columbia to provide the people of Alkali Lake with additional lands in accordance with the recommendations of the McKenna-McBride Commission and the supplementary list of alternative reserves sought by the Allied Tribes, but ultimately they failed to assert the Band's position aggressively. Had Canada been more concerned with attending to the Band's requirements and less with finalizing its global settlement with the province, we expect that, given the shortcomings in both the Band's existing land base and the additional lands approved by Ditchburn and Clark, the federal government would have withheld its consent to the final settlement insofar as the Alkali Lake Band was concerned.

Even if Canada *was* entitled to consider other interests, we do not believe that the "balancing" in this case took into account appropriate considerations. The evidence does not support Wynn-Johnson's representations that the Alkali Lake Band had no cattle, that its existing reserves were sufficient to satisfy its hay requirements, or that the creation of IR 15, 17, and 18 would lead to the erection of new fencing by the Indians – other than as mandated by the Grazing Commissioner – to exclude their neighbours. We do not believe that the desire of white ranchers to free up meadows already being used by their Indian counterparts – in essence, Indian settlement lands – constituted "grazing policy." In particular, as counsel for the First Nation points out, "[i]f the Grazing Commissioner and Major Clark had been right and the establishment of these reserves would have hindered the grazing needs of settlers, surely the Band members residing on these reserves would not have been permitted to remain and retain their fences once they were disallowed by the Ditchburn-Clark Commission."[602] Moreover, we must agree with counsel for the First Nation that Canada's willingness to sacrifice the reserve requirements of some bands in the interests of reaching a global settlement with the province also did not constitute a proper balancing consideration.

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[602] Stan H. Ashcroft, Ganapathi Ashcroft and Company, to John Hall, Research Manager, BC and Yukon Specific Claims West, Department of Indian and Northern Affairs, March 8, 1996 (ICC Exhibit 5D, pp. 6–7).

We conclude that, although in the final analysis the people of Alkali Lake *did* receive a net increase in land when their holdings before 1914 are compared with their reserves after 1924, it nevertheless seems evident from the opinion of Ashdown Green, based on his work on the ground, and from the comments of others, including Ditchburn, that it was reasonable to provide the Alkali Lake Band with additional reserve land *over and above* IR 9A, 11A, 16, the approved portion of IR 18, and the return of IR 6. Conversely, it appears to have been unreasonable to disallow IR 15, 17, and the remainder of IR 18.

Canada's Duties to Pursue Other Remedies

We have already concluded that, in the circumstances of this case, Canada was obliged (a) to scrutinize and assess, from the point of view of the Alkali Lake Band, the merits of J.W. Clark's proposal; (b) to inform the Band of the proposal, with information as to the alternatives and their possible consequences; (c) to seek instructions as to how to proceed, if the proposal was not acceptable to the Band; and (d) to withhold consent, if the proposal was improvident. The next question to arise is, assuming that, had Canada's representatives scrutinized Clark's proposal closely, they would have realized that they should vigorously press the Band's case to retain IR 15, 17, and 18, to what additional duties did Canada become subject to protect the Band's interests?

The First Nation contends that, if British Columbia refused to relent upon being pressed to permit the Alkali Lake Band to retain IR 15, 17, and 18, Canada should have pursued other remedies at its disposal to resolve its differences with the province. Possible remedies included invoking a reference to the Secretary of State for the Colonies under Article 13 of the *Terms of Union*, declaring the lands to be reserves – and thus unassailable by the province – under section 91(24) of the *Constitution Act, 1867*, or pursuing an action in the Exchequer Court under section 37A of the *Indian Act* of 1910, as amended. Alternatively, the First Nation submits that, if for whatever reason none of the foregoing alternatives could be successfully pursued, Canada could have obtained alternative lands or paid compensation to the Alkali Lake people in lieu of IR 15, 17, and the disallowed portion of IR 18. Of course, in the circumstances of this case, given that Canada formally approved the settlement proposal put forward by Clark and recommended by Ditchburn, resort by Canada to these remedies did not occur, and, in the First Nation's view, the failure to do so gave rise to a further breach of fiduciary duty. We will now deal with each of these suggested remedies in turn, starting with Article 13 of the *Terms of Union*.

(a) Duty to Refer the Issue to the Secretary of State for the Colonies under the Terms of Union

The First Nation submits that Article 13 of the *Terms of Union* provided one mechanism for resolving the dispute between Canada and British Columbia by permitting it to be referred to the Secretary of State for the Colonies for determination. It will be recalled that Article 13 states:

> **13.** The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for the purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government, *and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.*[693]

In the First Nation's opinion, given the differences between the findings of the McKenna-McBride Commission and the recommendations of Ditchburn and Clark, as well as the differences evident between Ditchburn and Clark themselves, Canada owed a duty to the people of Alkali Lake to refer the matter to the Secretary of State for the Colonies as the independent person or body provided for by Article 13 of the *Terms of Union*. Although the Indian Claims Commission in its report on the Homalco inquiry found no duty under Article 13, counsel contends that the present case is different because the First Nation is not asserting that the *Terms of Union* imposed a duty on Canada to set aside IR 15, 17, and 18 but rather an obligation to refer "attacks on those allotments" to the Secretary of State for the Colonies.[694]

In response, Canada submits that, given the ambiguity of Article 13 and the federal government's own doubts regarding the validity of Indian rights to land in British Columbia, it would have been impractical and perhaps imprudent for its representatives to press forcefully for references under the *Terms*

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[693] British Columbia, *British North America Act, 1867, Terms of Union with Canada, Rules and Orders of the Legislative Assembly* (Victoria: R. Wolfenden, 1881), 66 (ICC Documents, p. 5). Emphasis added.
[694] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, pp. 52–53.

of Union or section 37A of the *Indian Act*, particularly if such a reference might risk the loss of the reserve gains remaining after the Ditchburn-Clark process.[605] In counsel's submission, the people of Alkali Lake already held significantly greater quantities of reserve land than British Columbia had been in the practice of providing even under the generous policies of Governor Douglas; federal Minister of the Interior David Laird implied as much in his memorandum of November 2, 1874, when he wrote that Canada's representatives "feel they would not be justified in limiting their efforts *to what under the strict letter of the Terms of Union they were called upon to do*."[606] Accordingly, Canada is of the opinion that the Secretary of State for the Colonies would have been hard pressed to require British Columbia to set apart IR 15, 17, and 18 as reserves, regardless of what colonial Indian policy was considered.[607] In any event, counsel submits that the McKenna-McBride Agreement was intended to supersede Article 13, and it would have been contrary to the terms of that agreement "to simply abandon the process agreed to by the parties every time either party did not like the position taken by the other side."[608]

We do not find it surprising, given the ambiguity of Article 13, that the federal and provincial governments initially preferred to negotiate a settlement of the Indian land question in British Columbia rather than to submit the matter to the courts or some other independent person or body. The first attempt at resolving the matter through negotiation resulted in the establishment of the Joint Reserve Commission in 1876 and its replacement by single Commissioners beginning in 1878. This process operated under Commissioners Sproat, O'Reilly, and Vowell – subject to the approval of the Indian Superintendent and the provincial Chief Commissioner of Lands and Works, with differences to be referred to the Lieutenant Governor – until it broke down in early 1908; new negotiations resulted in the McKenna-McBride Agreement of 1912. When the province expressed concerns with the work of the Royal Commission, further negotiations led to the appointment of Ditchburn and Clark to review the Commission's report and to provide recommendations regarding its adoption. We see in this ongoing process a desire to circumvent the unfortunate wording of Article 13 by substituting, at least in the case of the McKenna-McBride Commission, an approach based on the reasonable requirements of the Indians. As long as the two governments were able to move forward under the Reserve Commissioners and the Royal Commission, there was no need for them to refer matters to the Secretary of State for the Colonies under Article 13.

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[605] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 75–77; Written Submission on Behalf of the Government of Canada, October 17, 2000, pp. 7–13.

[606] David Laird, Minister of the Interior, to Governor General in Council, November 2, 1874, in *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912), "Case in Appeal," Ex. 4, 26–30 (SCC). A handwritten version of this latter is in the record at ICC Documents, pp. 14–28.

[607] Written Submission on Behalf of the Government of Canada, October 17, 2000, p. 7.

[608] Written Submission on Behalf of the Government of Canada, October 17, 2000, p. 5.

It was only when these processes broke down – for example, when British Columbia refused in 1908 to continue with reserve allotments by the Reserve Commissioners and in 1919 to abide by the recommendations of the McKenna-McBride Commission – that the federal and provincial governments were faced with Article 13 as the alternative. As Deputy Superintendent General Scott wrote in 1917 in urging the two governments to accept the McKenna-McBride report before its public release:

> I think it is advisable that the Province and the Dominion should come to a reasonably speedy and harmonious decision on the Commission's report, otherwise the question would have to be referred to the Secretary of State for the Colonies under the provisions of Clause 13 of the Terms of Union.[699]

Given Scott's comments, we do not view the decision of the two governments to negotiate rather than litigate their differences as having *superseded* Article 13. The *Terms of Union* formed the backdrop to the relationships among Canada, British Columbia, and the Indians after 1871 and during the entire historical period to which this claim relates. Article 13 loomed as the alternative throughout.

In this context, we cannot conclude that the decision to negotiate was imprudent. Where it failed was in the implementation. In the rest of western Canada, unlike British Columbia, reserve creation was the result of two levels of negotiation involving the Indians and the Crown. The first level, with all the Indians of a particular treaty area, led to treaties in which the parties agreed upon the acreage and, in some cases, the location for the establishment of reserves. The second level of negotiation was conducted with individual bands and resulted in the creation of reserves where the Crown and a given band agreed on the land to be set apart. As we stated in our report on the treaty land entitlement claim of the Kahkewistahaw First Nation:

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[699] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Senator Hewitt Bostock, February 7, 1917, NA, RG 10, vol. 3822, file 59335-1, vol. 4, reel C-10,144 (ICC Exhibit 11, tab 1).

> In theory, the process of setting apart a reserve should have been straightforward. The band would identify the location it wanted for its reserve and would meet with Canada's officers – often the Indian agent or the surveyor or both – to communicate its choice.... If Canada agreed with the band's selection, and assuming there were no conflicting claims for the selected lands, steps would be taken to survey the reserve following a calculation of the band's entitlement....
>
> Based on the best information available, the surveyor would determine the band's population; calculate the area of land to be set aside, run survey lines on the ground, establish monuments to identify the area, document the work in field notes, complete a survey plan, and submit the plan to Ottawa for approval and registration. From the perspective of the band, members could accept the reserve set aside by the surveyor, either expressly by stating their approval or implicitly by residing on and using the reserve for their collective benefit. Conversely, the band might express its disapproval by objecting to Canada's officers or simply by refusing to live on or use the reserve as surveyed.
>
> It was only when *agreement* or *consensus* was reached between the parties to the treaty – by Canada agreeing to survey the land selected by the band, and by the band accepting the survey as properly defining the desired reserve – that the land as surveyed could be said to constitute a reserve for the purposes of the treaty.[700]

Clearly, this process stood a better chance of working in the prairie provinces, where treaty negotiations and reserve creation by and large preceded European settlement. In British Columbia, where the gold rush led to a rapid influx of miners and settlers and the creation of "vested" interests before the extinguishment of aboriginal title could be negotiated, concern arose at an early date that any recognition of aboriginal title could throw the entire system of title by pre-emption and purchase into disarray. Instead, colonial and provincial officials after Douglas chose to ignore aboriginal interests in land and to establish reserves ostensibly as a matter of royal pleasure rather than pre-existing legal right. Since British Columbia did not recognize the Indians as having anything in the nature of aboriginal rights or title to land, the kind of negotiations that characterized reserve creation on the prairies simply did not occur.

Reserve creation in British Columbia was ill-conceived from the start because one of the parties to the process was not at the table. The Indians had no say in establishing the terms of reference of the Joint Reserve Commission, Commissioners Sproat, O'Reilly, and Vowell, or the McKenna-McBride Commission. In fairness to Canada and British Columbia, it appears that reserve allocations by the Joint Reserve Commissioners and by Commissioners Sproat, O'Reilly, and Vowell were typically preceded by some degree of consultation between the Commissioners and the respective bands. The record in this inquiry further reveals that the people of Alkali Lake provided input to the McKenna-McBride Commission regarding the lands that band members wanted to have added as reserves. However, we see in British Columbia no evidence of consensus or the sort of opportunities afforded to prairie bands like Kahkewistahaw to object to allocations of reserve land once the Commissioners had handed down their decisions or recommendations. Indeed, given that British Columbia's reversionary interest in Indian reserves went hand in hand with the creation of the Joint Reserve Commission, any band that objected to a reserve set apart for its use and benefit ran the risk of simply losing that reserve outright to the province.

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[700] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998), 6 ICCP 21 at 79–80.

For the reasons we have already discussed, the work of Ditchburn and Clark is open to even broader criticism. Had their review been more akin to a quasi-judicial proceeding, the reasons of Iacobucci J in the *National Energy Board* case indicate that no fiduciary obligation would have arisen, but we have no doubt that their work would nonetheless be open to challenge on the basis that it failed to satisfy the requirements of natural justice in denying the Indians the opportunity to be heard.

As it is, Ditchburn and Clark were mere negotiators, but they failed to involve in their discussions the one party – the Indians – whose interests were most directly affected by the negotiations. This was no oversight. Neither Canada nor British Columbia was interested in giving the Indians a chance to respond to the work of the McKenna-McBride Commission once its report had been made public. As Deputy Superintendent General Scott wrote to Senator Hewitt Bostock on February 7, 1917:

> It appears to me on the whole that it would be advisable for the Province and for this Government on behalf of the Indians to accept the report. If it were to be released before acceptance and became the subject of examination and criticism by the Indians there could be no quiet settlement of the question, as I have formed the opinion that the Indians would hardly be satisfied with any reasonable arrangement for reserves. As you know they claim they should have large tracts of land and special privileges of hunting and fishing. I think that as they had full and free opportunity of making representations to the Commissioners, they should not have a second opportunity of criticizing an unconfirmed report....[301]

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[301] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Senator Hewitt Bostock, February 7, 1917, NA, RG 10, vol. 3822, file 59335-1, vol. 4, reel C-10144 (ICC Exhibit 11, tab 1).

We have already set forth our reasons for agreeing with the First Nation's submission that input from band members to Ditchburn and Clark – and indeed an arm's length review of the requirements of the Alkali Lake people – would have disclosed that they needed more land.

As for Canada's contention that it would have been impractical and imprudent to refer the Band's claim to the Secretary of State for the Colonies, this argument, based as it is on the bare language of the *Terms of Union*, might have made sense in the very early years following British Columbia's entry into Confederation. However, we believe that in later years the federal-provincial agreements giving rise to the Joint Reserve Commission in 1876 and the McKenna-McBride Commission in 1912 had the effect of resolving by consensus much of the ambiguity in that language. Although Article 13 stipulated that "tracts of land *of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for the purpose*, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians" – an admittedly ambiguous provision given the varying colonial policies for reserve land allocation – Canada and British Columbia subsequently agreed in 1876 and 1912 that the amount of land to be allotted to each band would depend on the needs of the bands concerned, which would in turn vary depending on each band's means of earning its livelihood. We do not see why the Secretary of State for the Colonies, should the matter have been referred to him, would have had to ignore those agreements.

Nor do we understand why a reference to the Secretary of State for the Colonies would entail the level of risk to the Band suggested by counsel for Canada. For bands whose memberships were largely devoted to fishing, hunting, small-scale farming, or hiring out as labourers, large areas of land were not as essential as they were to the ranching bands of the interior, such as the people of Alkali Lake. Although the per capita acreage of the Alkali Lake Band's reserves might have been higher – even considerably higher – than the provincial average, its members were still short of land suited to their way of life, as we have seen. In the circumstances, we expect that the Secretary of State for the Colonies, acting reasonably, would have been prepared to allow the Alkali Lake Band to retain IR 15, 17, and 18.

Canada, and Canada alone, decided not to refer the matter to the Secretary of State for the Colonies under Article 13, first when British Columbia refused to accept the recommendations of the McKenna-McBride Commission, and later when Ditchburn disagreed with Clark. Had Canada sought the Band's input as to how to proceed in response to Clark's proposal, we have no doubt that the Band would have asked to have the matter referred to the Secretary of State so that Wynn-Johnson's representations and MacKenzie's recommendations could be challenged. In our view, if the Band had selected this option, the reference should have been made.

Does our decision in the Homalco report preclude us from finding that Canada should have referred the matter to the Secretary of State for the Colonies? We do not think that it does. In that case, the Homalco Band applied in 1907 for 80 additional acres of reserve land immediately adjacent to Aupe IR 6. There was no evidence to indicate that the request was referred to Indian Affairs headquarters or representatives of the province; rather, Indian Agent R.C. McDonald simply advised Homalco Chief William on November 25, 1907, that "the Indian Department is not in a position to make further allotments of land for Indian purposes, and that your request cannot therefore be favorably considered."[702] In that context, the Commission concluded that, "[g]iven the difficulty in construing Article 13 and *the lack of decisive information available to us at this point*, we cannot find that Article 13 of the *Terms of Union, 1871*, imposed a duty on Canada to provide additional land in 1907."[703]

We have since learned that it was at about this time that disagreements between Canada and British Columbia had come to a head over the province's reversionary interest in reserve lands. The reserve allocation process, then the responsibility of Indian Superintendent A.W. Vowell, had virtually ground to a halt. Since British Columbia's consent was required to create reserves and because Canada and the province were clearly at an impasse over reserve creation generally, the federal government in 1907 was not in a position even to recommend reserves for the Homalco Band, and would not be until after the creation of the McKenna-McBride Commission five years later. Because the agreed process for reserve creation through Vowell – including "appeals" in the event of disagreement between the federal Indian Superintendent and the province's Chief Commissioner of Lands and Works – had foundered, the only alternative open to the federal government in 1907 would have been a reference to the Secretary of State for the Colonies under Article 13. Accordingly, we must, in retrospect – and notwithstanding our reluctance to do so previously in our report on the Homalco inquiry – conclude that Canada *should* have referred the matter to the Secretary of State for the Colonies, assuming that the Homalco Band, acting with the advantage of proper information and advice, would have directed Canada to do so. The same is true in the present case because, if Ditchburn had stood firmly – to the extent of risking the entire process under which he and Clark operated – in support of the Alkali Lake Band and others with regard to whom he disagreed with Clark. Article 13 represented the alternative course of action, just as Scott acknowledged it to be in 1917 before Ditchburn and Clark were appointed.

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[702] ICC, *Inquiry into the Claim of the Homalco Indian Band – Aupe Indian Reserves Nos. 6 & 6A Inquiry* (Ottawa, December 1995), reported (1996), 4 ICCP 89 at 118.

[703] ICC, *Inquiry into the Claim of the Homalco Indian Band – Aupe Indian Reserves Nos. 6 & 6A Inquiry* (Ottawa, December 1995), reported (1996), 4 ICCP 89 at 154. Emphasis added.

(b) Duty to Refer the Issue to the Exchequer Court under Section 37A of the Indian Act

It will be recalled that, on May 4, 1910, and May 19, 1911, in response to British Columbia Premier Richard McBride's unwillingness to refer 10 questions – three dealing with Indian title, and seven with the size of reserves – to the courts, the Liberal government of Sir Wilfrid Laurier enacted amendments to the *Indian Act*. The purpose of these amendments was to litigate the question of aboriginal title by bringing proceedings in the Exchequer Court on behalf of the Indians *against a provincial grantee or licensee*. Following the 1911 amendment, subsection (1) ultimately read:

> 37A. If the possession of any lands reserved or claimed to be reserved for the Indians, or of any lands of which the Indians or any Indian or any band or tribe of Indians claim the possession or any right of possession, is withheld, or if any such lands are adversely occupied or claimed by any person, or if any trespass is committed thereon, the possession may be recovered for the Indians or Indian or band or tribe of Indians, or the conflicting claims may be adjudged and determined or damages may be recovered in an action at the suit of His Majesty on behalf of the Indians or of the band or tribe of Indians entitled to or claiming the possession or right of possession or entitled to or claiming the declaration, relief or damages.[306]

According to the First Nation, IR 15, 17, and 18 were "lands reserved or *claimed to be reserved* for the Indians" as contemplated by section 37A. Therefore, because Canada had a fiduciary obligation, according to counsel, to use all means at its disposal to protect those lands for the use and benefit of the Alkali Lake people, it should have commenced an action in the Exchequer Court on behalf of the Band to have the claim adjudged and determined. Canada breached its obligation because, in counsel's words, "if the

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[306] *Indian Act*, RSC 1906, c. 81, as amended by SC 1910, c. 28, s. 1, and SC 1911, c. 14, s. 4.

Federal Crown had pursued this route, the Exchequer Court, upon examining the legislation governing Messrs. Ditchburn and Clark, the relevant Orders in Council, the McKenna-McBride Agreement, the use and possession of I.R.s 15, 17 and 18 by the Esketemc and their need for these lands, and the factual basis in support of Major Clark's position, or lack thereof, would undoubtedly have found in favour of the Esketemc in relation to the preservation of I.R.s 15, 17 and 18."[705] In support of this position, the First Nation relies on the decision of the Indian Claims Commission in its report on the claim of the Homalco Indian Band in relation to Aupe IR 6 and 6A, which in counsel's view was "an analagous situation."

Canada argues that the application of section 37A was limited to situations in which the possession of lands claimed by the Indians was withheld or adversely occupied, as in the Homalco inquiry. Canada considers that case to be distinguishable because a third party – schoolteacher William Thompson – actually occupied and applied to pre-empt lands used by the Homalco Band.[706] Section 37A does not apply in the present case, in counsel's view, because, rather than being subject to trespass or adverse claims, IR 15, 17, and 18 had been used by the Alkali Lake Band for a number of years prior to the allotments by the McKenna-McBride Commission and continued to be used by it at the time Ditchburn and Clark carried out their review.

According to Canada, the section did not give rise to a fiduciary obligation to obtain more land for the Band. Nor did it create an obligation to pursue litigation because its terms were permissive rather than mandatory, and under subsection (4) the provision explicitly preserved all the Band's existing rights to seek its own remedies. Canada chose to negotiate rather than litigate, and, given that the McKenna-McBride Commission had merely *recommended* IR 15, 17, and 18 as reserves, the Band, in Canada's submission, had neither a reserve, nor lawful possession, nor any other legal interest in those lands on which to base a claim.[707] Accordingly, Canada's representatives considered a referral to the Exchequer Court to be time consuming and futile. In these circumstances, the First Nation has not established, in counsel's submission, that the approach taken was imprudent in the circumstances.[708]

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[705] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 59.

[706] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 81; ICC Transcript, September 26, 2000, p. 145 (Michael Mladen).

[707] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 82; ICC Transcript, September 26, 2000, p. 144 (Michael Mladen).

[708] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 81–83; ICC Transcript, September 26, 2000, p. 144 (Michael Mladen).

In reply, the First Nation contends that section 37A did not impose an obligation on Canada to *obtain* a reserve for the people of Alkali Lake, but to *protect* IR 15, 17, and 18 for their use and benefit. However, the effect of the review by Ditchburn and Clark was to take away the Band's right of possession. Moreover, although Canada may have chosen to negotiate with British Columbia rather than litigate, it nevertheless breached its fiduciary obligation because it failed to consult the Band when the "spectre" of losing IR 15, 17, and 18 arose.[709]

In our report on the Aupe IR 6 and 6A claim of the Homalco Indian Band, we discussed Canada's obligation to protect Indian lands in these terms:

> Even if a unilateral undertaking to protect Indian settlement lands is required, we are of the view that such an undertaking existed as is reflected, at least by May 19, 1911, in section 37A of the *Indian Act*...
>
> The House of Commons *Debates* reveal that the amendment was intended to protect lands which were occupied by Indians but which were not reserves:
>
>> Mr. Oliver: This Bill [(No. 177) to amend the Indian Act] is made up of four sections each independent of the other and each intended to meet a condition now existing in connection with the administration of Indian Affairs.... Several provisions are considered desirable owing to the changed conditions resultant from pressure of population...
>>
>> …
>>
>> Mr. Doherty: What is the changed effected in the law by this section?
>> Mr. Oliver: This is a substitution for [section] 37A which was the principal amendment of the Act of last session. Possession is nine points of the law, and it was found that previous to the passing of this provision there was serious difficulty in removing trespassers from Indian lands. This legislation made it possible to facilitate the removal of settlers from lands that were held as Indian reserves. We have found, however, that Indians in occupation of lands that are not specially reserved have not the protection it is desirable they should have. In the Yukon there are no reserves, and the efforts of the missionaries and others are directed to getting the Indians to enter on the permanent occupation of the land, and we think it is right they should have that protection which this amendment proposes to give them.
>> Mr. Doherty: I understand the minister to say that this extends to land which the Indians claim.
>> Mr. Oliver: Exactly.[710]
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> We do not see Mr. Oliver's reference to the Yukon as limiting the geographical scope of Canada's undertaking: the actual words of the amendment are much more broad

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[709] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 48.
[710] Canada, House of Commons, *Debates*, April 26, 1911, 7825, 7867.

> and general. In this case, the conditions specified in section 37A were met: the "lands which [the Band] claim[ed] the possession or [a] right of possession" (that is, the Band's settlement lands) were adversely occupied or claimed by Mr. Thompson. Section 37A implies an undertaking on the part of Canada to protect such lands.[71]

In the present case, there is no fraudulent third party like William Thompson who sought to pre-empt lands used by the band for purposes like a school and graveyard, as was the situation in the Homalco inquiry. Nor do we perceive that the effect of disallowing IR 15 and 17 and reducing IR 18 would be to dispossess the Alkali Lake Band of those lands or to set up some form of adverse occupation by a third party. We have already concluded that IR 15, 17, and 18 constituted Indian settlement lands under the provincial *Land Act*, and we see no reason why those lands could not and did not continue to be settlement lands even after the failure by Ditchburn and Clark to confirm them as reserves.

Even if the effect of disallowing the Band's applications to convert those lands to reserve status would have been to place the people of Alkali Lake in the untenable position of being in unlawful possession of their settlement lands, as the First Nation contends, the conundrum with which we would then be faced is that the federal government, by whom any action under section 37A was to be commenced, was also a party to the process by which the Band was ultimately deprived of IR 15, 17, and 18. There would have been no cause of action until the recommendations of Ditchburn and Clark were implemented by the provincial and federal Orders in Council of 1923 and 1924 since, until that time, the Band would not have formally been dispossessed of the lands. Once the cause of action arose, however, the federal Crown would have had to be both plaintiff and defendant.

Seen in this light, we cannot conclude that section 37A would have been an appropriate remedy in the circumstances of this case. If the disallowance of IR 15 and 17 and the reduction of IR 18 are to be challenged, they must be challenged on the basis of the decision to disallow or reduce those proposed reserves, and not on the basis of the alleged trespass or withholding of possession resulting from that decision.

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[71] ICC, *Inquiry into the Claim of the Homalco Indian Band – Aupe Indian Reserves No. 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996), 4 ICCP 89 at 163-64.

(c) Duty to Declare the Lands to Be Reserves under Section 91(24) of the Constitution Act, 1867

The Esketemc First Nation takes the position that IR 15, 17, and 18 fell within the purview of section 91(24) of the *Constitution Act, 1867*, and that, accordingly, it became incumbent upon the federal government pursuant to its fiduciary duty to insist on British Columbia's acceptance of the reserve boundaries recommended by the McKenna-McBride Commission.[712] The Commission agrees with Canada, however, that it was not open to the federal government to place IR 15, 17, and 18 beyond the legislative competence of the provincial government by simply declaring them to be reserves and thus subject to protection as "lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. Clearly, although the First Nation is correct in suggesting that federal jurisdiction over reserve lands under section 91(24) is not inconsistent with title to those lands being held by the provincial government,[713] the lands at issue here could nevertheless only be set apart as reserves if Canada and British Columbia agreed and acted jointly to do so. They did not.

Moreover, we do not believe that section 91(24) imposes on Canada a positive obligation to acquire and set apart reserve lands, or to assist in doing so, at the request of a band. As we stated in our report on the claim of the Homalco Indian Band regarding Aupe IR 6 and 6A:

> At the outset, we have difficulty with the Band's implicit suggestion that such an obligation arose from section 91(24) of the *Constitution Act, 1867*. Although section 91(24) defines who, between the provincial and federal governments, has legislative power with respect to "Indians" and "Lands reserved for the Indians," it does not *per se* create a legal obligation to establish reserves. This point was briefly addressed by Mr. Justice Addy in *Apsassin v. Canada*. In discussing the Crown's fiduciary duty in that case, he remarked as follows:
>
> > Finally, the provisions of our Constitution are of no assistance to the plaintiffs on this issue. The Indian Act was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada by s. 91(24) of the Constitution Act, 1867. This does not carry with it the legal obligation to legislate or to carry out programs for the benefit of Indians any more than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of

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[712] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 53.
[713] Written Submission on Behalf of the Esketemc First Nation, September 18, 2000, p. 17.

> course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.[714] ...
>
> Thus, although there may have been a moral or political duty for Canada to provide additional reserve lands for the Band, section 91(24) of the *Constitution Act, 1867*, did not create a legal obligation to do so.[715]

More recently, in *Musqueam Holdings Ltd. v. British Columbia*, the British Columbia Court of Appeal was called upon to address section 36 of the 1985 *Indian Act*,[716] which provides that the statute is to apply to lands set apart for the use and benefit of a band as though those lands were reserves, notwithstanding that legal title to those lands is not vested in the Crown. On behalf of the court, Southin JA wrote:

> The interpretation put forward by the appellants can only be correct if Parliament has the power under the rubric of head 24 [of section 91 of the *Constitution Act, 1867*] unilaterally to transmute land owned by Indians anywhere in Canada into lands reserved for Indians with such privileges as Parliament confers by legislation on lands so reserved and their occupants...
>
> As to that interpretation, I say first, no authority before or since s. 36 was enacted has ever so interpreted head 24; secondly, counsel, in what I am sure were exhaustive researches, has found nothing in the Parliamentary proceedings of 1951 to indicate that such was the intention; thirdly, such an interpretation would give rise to a constitutional row of epic proportions, the Province asserting that lands reserved for the Indians means, in the provinces named in the Act of 1867, only lands reserved before Confederation or lands which the Province had subsequently agreed became reserved...
>
> [Q]uite apart from the constitutional clash between Parliament and the provinces which such an interpretation would cause, it would mean that in 1951 Parliament intended by s. 36 to supplant provincial jurisdiction and to divest the Crown in right of Canada of its prerogative right to decline a legal burden...
>
> I do not accept that Parliament intended any such thing.[717]

Accordingly, we continue to believe that the conclusion we reached in the Homalco inquiry was the correct one.

We have established on the facts that the Alkali Lake Band had a preexisting legal interest in IR 15, 17, and 18 by virtue of its use and occupation of the lands both before and after the work of the McKenna-McBride Commission, as well as by virtue of clause 8 of the McKenna-McBride Agreement and sections 7 and 54 of British Columbia's *Land Act* of 1911. This interest grounds our fiduciary analysis. We have not been asked, nor is it within our mandate, to determine the First Nation's title to these lands. The case for aboriginal title may be made by the First Nation but in another setting.

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[714] *Apsassin v. Canada*, [1988] 3 FC 3 (TD) at 47.

[715] ICC, *Inquiry into the Claim of the Homalco Indian Band – Aupe Indian Reserves No. 6 & 6A Inquiry* (Ottawa, December 1995), 4 ICCP 89 at 147–48.

[716] Indian Act, RSC 1985, c. I-5.

[717] *Musqueam Holdings Ltd. v. British Columbia*, [2000] BCJ No. 1114 (BCCA) at 12–13.

(d) Duty to Obtain Alternative Lands or Pay Compensation

The First Nation submits that, once Canada had exhausted all avenues for preserving and protecting IR 15, 17, and 18 for the use and benefit of the people of Alkali Lake, the federal government then had a fiduciary obligation to obtain adequate alternative lands to meet the Band's reasonable requirements. According to counsel, alternative lands were available because some of them were included in other applications made by members of the Band to the McKenna-McBride Commission, and others appeared on the supplementary list submitted by Ditchburn to Patullo on February 10, 1923.[718] If no alternative land was available, it was then incumbent upon the Crown to compensate the Band for its lost land and improvements.[719] Because Canada failed to do either of these things, it breached its fiduciary obligations to the Band.

Canada, for its part, argues that, since the recommendations of the McKenna-McBride Commission to set apart IR 15, 17, and 18 as reserves were never approved by the federal and provincial governments, there was no obligation to compensate the people of Alkali Lake for the lands under the surrender provisions of the *Indian Act*.[720] Nevertheless, counsel contends that both Ditchburn and Scott made concerted efforts to have alternative allotments of reserve land set apart for the Band, but they were limited in what they could accomplish by the fact that the establishment of reserves in British Columbia required the concurrence and consent of the provincial government.[721] Canada further contends that the First Nation's submissions on this point are largely based on a lack of evidence regarding the federal government's efforts to protest the disallowance of IR 15, 17, and 18, and it submits that, since Ditchburn is not alive to defend his conduct or to testify as to the representations he might have made on the Band's behalf, it would be unfair to base a breach of fiduciary duty on a lack of evidence.[722]

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[718] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 50.
[719] Written Submission on Behalf of the Esketemc First Nation, July 25, 2000, p. 52.
[720] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 72.
[721] Written Submission on Behalf of the Government of Canada, September 1, 2000, pp. 86–87.
[722] Written Submission on Behalf of the Government of Canada, September 1, 2000, p. 88.

We have already considered and dismissed most of Canada's arguments on this issue. Although IR 15, 17, and 18 never became reserves, we have found, based in large part on Ditchburn's own statements, that it was nevertheless unreasonable for Canada to have permitted them to be disallowed or reduced. Ditchburn and Scott made some effort to convince British Columbia's representatives to retain some of these lands, as well as lands on the supplementary list, for the Band's use and benefit, but it is clear that they were not prepared to jeopardize the overall settlement with the province to safeguard the Band's interests. The need for British Columbia's concurrence, although essential to create reserves, was nevertheless irrelevant and misleading as far as Canada's ability to take protective steps unilaterally on the Band's behalf.

We do not agree with Canada that to find for the First Nation would require us to base a breach of fiduciary obligation on a lack of evidence, since Ditchburn and Scott have not been given an opportunity to defend themselves. In our view, although there may be little evidence of protests made by Canada's representatives regarding the disallowance or reduction of IR 15, 17, and 18, the record is clear that they failed (a) to scrutinize and assess, from the point of view of the Alkali Lake Band, the merits of Clark's proposal; (b) to inform the Band of the proposal, with information as to the alternatives and their possible consequences; (c) to seek instructions as to how to proceed; and (d) to withhold consent to an improvident transaction. In any event, we also feel compelled to comment on the incongruity of Canada's complaint regarding the lack of opportunity given to Ditchburn and Scott to present their position when Canada at the same time seeks to justify the position put forward by Ditchburn and Clark that was arrived at without providing the people of Alkali Lake with the chance to respond to the representations of Wynn-Johnson, the recommendations of Grazing Commissioner Mackenzie, or the conclusions of the McKenna-McBride Commission.

Ultimately, we conclude that, if, for whatever reason, Canada was unable to insist on British Columbia's cooperation in setting apart IR 15, 17, and the rejected portion of 18 as reserves for the Alkali Lake Band, it became obliged to provide the Band with alternative lands or to compensate it for the loss of IR 15, 17, and 18 so that it could acquire lands on its own account.

Finally, as an aside, we note that several of the elders at the May 2, 2000, community session testified that IR 15, 17, and part of 18 remain vacant today and that their priority is to gain back these lands. The elders spoke of the First Nation's growing population and the lack of jobs for young people.

resulting in a need for more land for homes and for teaching the next generation to obtain their livelihood from the land. Willard Dick expressed it well:

> My mom and dad had nine children, and from that nine children, they had about 40 some grandchildren. And I don't know, about half of that, great grandchildren. It just goes to show how fast population is beginning to grow. And jobs, they is getting shorter. That's why we're trying to get those reserves put back in the reserve so we're going to have to go back to that, because most of our younger generation here don't have jobs, can't find jobs....
>
> With all the cutbacks that's going on everywhere, we're going to have to do what we used to do. We're going to have to teach the next generation how to live off the land. That's why these little reserves we're so concerned about, it's going to come back.[723]

The desire to recover these lands was echoed by elder Laura Harry, who stated that the population has doubled in recent times, which is why "[w]e need our meadows, that's what we need."[724] Similarly, Chief Andy Chelsea concluded his testimony by stating his view that "the only way we're going to be able to survive is if we start using the lands that we were using in the past.'"[725]

The Commission does not have a mandate to report on the compensation criteria applicable in the negotiation of a settlement unless the parties disagree. We simply note that, given the testimony and the possibility that the majority of these lands may remain unalienated provincial Crown land, the restoration of the land may be an alternative for the parties to consider in any future negotiation.

Prejudice to Aboriginal Land Rights

Finally, we must consider Canada's argument of last resort – that the reserve creation process encompassed by the McKenna-McBride Commission, as amended by Ditchburn and Clark and approved by the two governments, did nothing to extinguish or diminish the First Nation's pre-existing aboriginal rights in lands that did not become reserves. Canada contends that there has been no prejudice to the Esketemc people because whatever rights they had in IR 15, 17, and 18 before 1914 continued to exist after the Orders in Council of 1923 and 1924, and they will form the subject matter of comprehensive claims negotiations before the British Columbia Treaty Commission.

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[723] ICC, Transcript, May 2, 2000, pp. 44–45 (Willard Dick).
[724] ICC, Transcript, May 2, 2000, p. 118 (Laura Harry).
[725] ICC, Transcript, May 2, 2000, p. 139 (Chief Andy Chelsea).

We believe, however, that detriment to the First Nation's interests has been established. Not only did the provincial and federal Orders in Council of 1923 and 1924 ordain that IR 15, 17, and 18 were *not reserves*, but the Special Joint Committee of the Senate and House of Commons further ruled in 1927 that the Indians had *no aboriginal title*. To back this ruling up, that same year the federal government enacted the amendment to the *Indian Act* precluding the Indians from raising the funds required to prosecute claims, a provision that was not repealed until 1951. For that period of time at least, the Esketemc First Nation was prevented from protecting those lands and delayed in being able to initiate proceedings to recover them. Further compounding the problem, members of the Band do not appear to have been told that IR 15, 17, and 18 had been disallowed as reserves, so they could not take whatever steps they considered necessary to protect their interests. Evidence from the community session indicates that, in later years, band members were even forced to vacate IR 15, 17, and 18.

It is true that, in the surrender of aboriginal title, bands seldom if ever receive reserves corresponding to the full extent of their aboriginal territory. Even if they do not, the evidence before the Commission is that portions of *these* lands, no matter how important they are or may have been to the Esketemc people, may no longer be available for selection or of use to the First Nation, having now been alienated to third parties or logged out. Regardless of whether compensation might be available to the First Nation for loss of use or damages to the lands, we cannot conclude that the facts of this case have proven anything *but* prejudicial to the First Nation's interests in the lands.

ISSUES 8 AND 9 NEGLIGENCE AND ESTOPPEL

Did Canada owe a duty of care to the Alkali Lake Band under the circumstances and, if so, was the federal government negligent in failing to:

(a) protect and preserve the Lands for the Alkali Lake Band;
(b) obtain reserve status for the Lands and have them set apart for the use and benefit of the Alkali Lake Band;
(c) obtain adequate alternate land as reserve set apart for the use and benefit of the Alkali Lake Band;
(d) obtain or pay monetary compensation to the Alkali Lake Band for the Lands;

(e) invoke Article 13 of the *Terms of Union* admitting British Columbia into Canada;

(f) take the position that the Lands fell within the purview of subsection 91(24) of the *Constitution Act, 1867*; and/or

(g) invoke Section 37A of the *Indian Act* of 1910?

Is Canada estopped from arguing that the Lands were not, or are not, reserves?

We have concluded that Canada owed, and failed to satisfy, fiduciary obligations to the Alkali Lake Band: (a) to scrutinize and assess, from the Band's point of view, the merits of J.W. Clark's proposal to deny or reduce IR 15, 17, and 18; (b) to inform the Band of the proposal, with information as to the alternatives and their possible consequences; (c) to seek instructions as to how to proceed, if the proposal was not acceptable to the Band; and (d) to withhold consent, if the proposal was improvident. Accordingly, we do not consider it necessary to explore the First Nation's claims based on negligence and estoppel.

PART V

CONCLUSIONS AND RECOMMENDATION

In this inquiry, the Indian Claims Commission has been asked to report on whether the Government of Canada owes an outstanding lawful obligation to the Esketemc First Nation. We have concluded that it does.

In so saying, we have not found that the McKenna-McBride Commission had the authority to set apart IR 15, 17, and 18 as reserves or *de facto* reserves, or that W.E. Ditchburn and J.W. Clark exceeded their jurisdiction in their review of the Royal Commission's work. Rather, we base our conclusion on fiduciary principles. By the terms of the McKenna-McBride Agreement of September 24, 1912, Order in Council PC 3277, and the *British Columbia Indian Lands Settlement Act*, Canada unilaterally assumed the responsibility for representing the interests of the Alkali Lake Band, effectively ceding for the Band any decision-making power it had with regard to the creation of its reserves. In these circumstances, it was reasonable for the Band to expect Canada to act in its best interests. The Band was vulnerable to the manner in which Canada exercised its discretion or power, first in the creation of the McKenna-McBride Commission, later in the appointment of Ditchburn and his recommended acceptance of Clark's proposal to disallow IR 15, 17, and most of 18, and finally in the federal government's adoption of Ditchburn's recommendation. Given the suspect information on which Clark based his proposal, we find that Canada had a duty (a) to scrutinize and assess, from the Band's point of view, the merits of Clark's proposal; (b) to inform the Band of the proposal, with information as to the alternatives and their possible consequences; (c) to seek instructions as to how to proceed, if the proposal was not acceptable to the Band; and (d) to withhold consent, if the proposal was improvident. If so instructed, Canada should have referred the matter to the Secretary of State for the Colonies for a determination of whether the Band was entitled to these lands. We do not agree with the First Nation's submission that section 37A of the 1906 *Indian Act*, as amended, and section 91(24) of the *Constitution Act, 1867*, presented effective remedies on the facts of this case. Alternatively, if Canada was unable to secure IR 15, 17, and 18 for the Band, it should have acquired and provided other reserve lands to the Band or compensated the Band for the loss of IR 15, 17, and 18 so that it could acquire lands on its own account. Canada failed to do any of these things, and accordingly breached its fiduciary obligations to the ancestors of the present-day Esketemc First Nation.

In conclusion, we therefore recommend to the parties:

That the claim of the Esketemc First Nation regarding the disallowance or reduction of IR 15, 17, and 18 be accepted for negotiation under the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde Sheila Purdy

Daniel J. Bellegarde	Sheila G. Purdy
Commissioner	Commission

Dated this 8th day of November, 2001

APPENDIX A

ESKETEMC FIRST NATION INQUIRY – IR 15, 17, AND 18 CLAIM

1	**Planning conferences**	Vancouver, September 30, 1999 Vancouver, February 10, 2000
2	**Community session**	Alkali Lake, BC, May 2 and 3, 2000

The Commission heard evidence from Esketemc First Nation elders Jimmy Johnson, Willard Dick, Hazel Johnson, Antoinette Harry, Theresa Paul, Laura Harry, Arthur Dick, and Chief Andy Chelsea.

3	**Legal argument**	Williams Lake, BC, September 26, 2000

4 **Content of formal record**

The formal record for the Esketemc First Nation IR 15, 17, and 18 Inquiry consists of the following materials:

- the documentary record (3 volumes of documents, with annotated index) (Exhibit 1)
- Exhibits 2–13 tendered during the inquiry
- transcript from the community session (1 volume)
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and counsel for the Esketemc First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX B

RESERVES RECOMMENDED OR SET APART FOR THE ALKALI LAKE BAND, 1864–1927

IR	Area (Acres)					
	1864 Stipendiary Magistrate A.C. Elliott	1881 Commissioner Peter O'Reilly	1895 Commissioner Peter O'Reilly	1916 McKenna-McBride Commission	1924 W.E. Ditchburn and J.W. Clark	1927 D.M. MacKay surveyor
1	40	506.5	506.5	506.50	506.50	506.50
2		800.0	800.0	800.00	800.00	800.00
3		180.0	180.0	180.00	180.00	180.00
4		540.0	540.0	540.00	540.00	540.00
5		227.0	227.0	227.00	227.00	[illegible]
6		1,280.0	1,280.0		1,280.00	1,280.00
7		34.0	34.0	7.02	[illegible]	[illegible]
8			480.0	480.00	480.00	480.00
9			1,600.0	1,600.00	1,600.00	1,600.00
9A				180.00	180.00	[illegible]
10			200.0	200.00	200.00	200.00
11			400.0	400.00	400.00	400.00
11A				[illegible]	[illegible]	[illegible]
12			200.0	200.00	200.00	200.00
13			1,600.0	1,600.00	1,600.00	1,600.00
14			80.0	80.00	80.00	80.00
15				480.00		
16				40.00	40.00	[illegible]
17				[illegible]		
18				[illegible]	[illegible]	[illegible]
Area Added		4,547.5	3,760.0	6,032.00	1,340.00	[illegible]
Area Withdrawn				([illegible])	(5,062.00)	([illegible])
Net Increase/ Decrease		4,547.5	3,760.0	4,685.02	(3,722.00)	[illegible]
Total	40	4,587.5	8,347.5	13,032.52	9,310.52	9,463.50

APPENDIX C

SUMMARY OF EVIDENCE REGARDING IR 1 THROUGH 14

Reserve	Evidence
IR 1 (596.5 acres)	Commissioner O'Reilly (1881): IR 1 included the original 40-acre reserve set apart during the colonial period and is the site of the village. The reserve included a sufficient quantity of valuable timber, but *only 90 acres available for agricultural purposes which could not be increased as the reserve was hemmed in on the north, east, and south by mountains, and on the west by the farm of H.O. Bowe, which included all the good land in the Valley as far as Alkali Lake.* The Commissioner set aside 100 inches of water for this reserve to be taken from Alkali Lake Creek. Chief Samson: IR 1 contained about 50 acres of cultivated land. *Even with more water, the cultivated area could not be increased because the Band was already farming all of the cultivable land.* Agent Ogden: The agent considered this to be "pretty good land," with about 150 acres cleared for cultivation in grain, timothy hay, oats, barley, wheat, and various root crops. *The remainder was largely sidehills with rocks or covered with pines and scrubby fir, but very few merchantable sawlogs. Local settlers named Johnson (likely C.E. Wynn-Johnson) and Moore had prior rights to water, so Ogden suggested that the Band build dams on the mountain to store water since it had no formal water rights.* Very nearly all of the Band's members resided on this reserve.
IR 2 (800 acres)	Commissioner O'Reilly (1881): This reserve was situated on the mountain northeast of the village. The north fork of Alkali Lake Creek ran through it, and O'Reilly considered that it would be valuable as a dairy farm since it was covered with bunch grass. The Band attempted to cultivate 30 acres, which had been fenced and irrigated by means of a ditch constructed by the Indians, but *Ogden doubted whether it could be farmed because of its elevation.* Chief Samson: IR 2 was used to range stock. *Although the Band had tried to cultivate this land, it lacked water and would grow only a little hay in rainy years.* Agent Ogden: Featuring cottonwood and small pines, some of this land had been cleared and was good pasture land, with parts fit for dry farming, although none of it was then cultivated. The agent was not aware of the Indians having tried to cultivate it during his tenure.

Reserve	Evidence
IR 3 (180 acres)	Commissioner O'Reilly (1881): IR 3 lay further up the mountain on the same creek as IR 2. Its value lay in the fact that it was well watered and was capable of producing a large quantity of swamp hay. The Indians had wintered a portion of their stock there for several years past and had built stabling and corrals. Chief Samson: The Band used IR 3 to cut swamp hay, and *a portion of the reserve contained rocky timbered land that would not support hay even if cleared*. Band members had erected a dam at the lower end of the reserve to irrigate the swamp hay, but building a larger dam would only kill the hay. They preferred to keep the hay on this reserve rather than have more water. Agent Ogden: This land was similar to IR 2, being covered with small cottonwood and pine and fit only for dry farming if cultivated. It was good pasture land with some hay cut on it.
IR 4 (540 acres)	Commissioner O'Reilly (1881): IR 4 comprised hay and grazing lands, with a few acres of good timber. The Indians had attempted to cultivate on a small scale but, *despite the presence of a good water supply, frost had destroyed the crop*. Chief Samson: IR 4 produced about 15 tons of timothy hay annually. Despite having plenty of water because a creek ran through it, *the reserve did not support cultivation because of its elevation and the resulting risk of frost*. Agent Ogden: The agent was not familiar with this reserve.
IR 5 (227 acres)	Commissioner O'Reilly (1881): Of this reserve, 75 acres were good swamp land, and this area could be increased at a small cost by removing beaver dams obstructing the stream. The remainder of the reserve was grassy land thickly timbered with cottonwood and black pine. A good stream of water flowed the entire length of the reserve. Chief Samson: *Less than one quarter of IR 5 (Mixton) was good flat land*, and this area produced 10 tons or more of hay per year – the reserve's full potential. *The remainder of the reserve was timbered and rocky*. Although a lake at the lower end of the reserve naturally irrigated the productive hay lands, *it was not possible to irrigate additional portions of the reserve, some of which were alkali bottom that would not grow anything*. Agent Ogden: The agent was not familiar with this reserve.
IR 6 (1,250 acres)	Commissioner O'Reilly (1881): IR 6 was the Band's favourite winter run for its horses because the snow soon disappeared from it. The land was also much broken by deep ravines that afforded shelter from the prevailing winds. *Some 250 acres were good level land capable of being converted into a valuable farm if it was possible to bring in a supply of water*. Since the Indians were anxious to irrigate, O'Reilly reserved the entire water supply of Harper's Lake for this purpose. He recommended spending $750 to $1000 to assist the Indians in designing and constructing a small dam at the outlet of the lake.

Reserve	Evidence
	Chief Samson: The Band used IR 6 (Wycott's Flat) to range up to 100 horses in the winter, but did not use it for cattle. *Band members had spent two years trying to irrigate this land, but the lake forming the source of water ran dry while the ditch was being constructed. The only other way to irrigate the land would be from the Fraser River, but the reserve was 700-800 feet above the river.* Agent Ogden: This reserve was a big flat on the bank of the Fraser River and would be good land if water could be gotten to it. The only potential source of water was the Fraser River, but pumping water to that height was out of the question. *The land was very dry because of its elevation, and the Band just used it for their stock.*
IR 7 (14 acres)	Commissioner O'Reilly (1881): IR 7 was situated on the north shore of Lac la Hache, and O'Reilly also provided the Band with the exclusive right to fish on the left bank of the Fraser River from the mouth of the Chilcotin River to the mouth of Little Dog Creek, an approximate distance of 4 miles. Chief Samson: This reserve was the site of a graveyard and was used as a fishing station. Band members also had fishing rights in the Fraser River. Agent Ogden: IR 7 was used only for fishing.
IR 8 (480 acres)	Commissioner O'Reilly (1895): The Indians cut hay from 20 acres of this land, but with a little labour the area could be doubled. With very little labour, *the meadow lands in IR 8 through 14 were all capable of being enlarged by clearing, the Indians using only those portions naturally free of brush, but were at too great an altitude to be used for any other purpose.* Chief Samson: Band members were able to cut about four tons of hay on IR 8 (Little Springs). Only a small portion of the reserve could be hayed because of the natural irrigation provided by springs, and *very little of the remainder was irrigable since much of the land was alkali bottom.* Agent Ogden: The agent had only passed through this reserve, but he recalled that it was made up of cottonwood, pines, and small meadows. It would make good land if cleared, but *it had no water so it would be a dryland farming proposition only,* although the meadows did not appear to require irrigation. The Band cut a little hay on the meadows.
IR 9 (1,100 acres)	Commissioner O'Reilly (1895): *Approximately 1,000 acres of IR 9 were open swamp* land from which the Indians obtained about 40 tons of good swamp hay. Chief Samson: IR 9 (Chilolicum) was used to cut about 30 tons of swamp hay in the bottom lands where springs provided natural irrigation. Man-made irrigation would not assist in increasing the hay yield. The reserve also contained some small black pine suited only for rails and firewood. Agent Ogden: The agent was not familiar with this reserve.

Reserve	Evidence
IR 10 (300 acres)	Commissioner O'Reilly (1895): *Some 175 acres of IR 10 constituted good swamp land*, most of which was used by the Indians to cut hay. Chief Samson: Naturally irrigated by springs, IR 10 (Loon Lake) produced about 10 tons of swamp hay annually. Agent Ogden: The agent was not familiar with this reserve.
IR 11 (800 acres)	Commissioner O'Reilly (1895): *IR 11 contained about 200 acres of swamp land*, from which the Indians cut 40 tons of hay. The Indians built a house and corrals on this reserve, where they wintered their stock during inclement weather. Chief Samson: Band members had dammed a creek running through IR 11 (Samson's Meadow) to flood this meadow and irrigate it, producing approximately 20 tons of hay per season. *The Band was using all of the good land on this reserve, there being no additional lands suited to cultivation or haying.* Agent Ogden: The agent was not familiar with this reserve.
IR 12 (300 acres)	Commissioner O'Reilly (1895): *Of the 300 acres in IR 12, 90 acres were swamp.* There was little natural hay on this reserve, but it could be easily cleared of brush. Chief Samson: IR 12 was naturally irrigated by a creek running through it. The Band cut some 15 tons of swamp hay there each year, but *the remaining land could not be improved by irrigation since it was rough rocky ground.* Agent Ogden: The agent was not familiar with this reserve.
IR 13 (1,400 acres)	Commissioner O'Reilly (1895): IR 13 included three swamps from which a large quantity of hay was obtained. There was also excellent pasture land in the vicinity and the surrounding country was well watered. Chief Samson: Band members were able to cut about 10 tons of hay from IR 13 per annum. The reserve was traversed by a creek that the Band had dammed to flood the meadow lands. *The remaining lands were rocky bottom lands and not irrigable.* Agent Ogden: The agent was not familiar with this reserve.
IR 14 (80 acres)	Commissioner O'Reilly (1895): Although IR 14 was small, it was almost all meadow land and yielded an abundant supply of excellent hay. Chief Samson: IR 14 (Roper's Meadow) was used to cut about six tons of hay annually. A small creek ran through the reserve and naturally irrigated the swamp lands from which the hay was harvested. *The remaining lands were covered by boulders and rocks.* Agent Ogden: The agent was not familiar with this reserve.

Source: Peter O'Reilly, Indian Reserve Commissioner, to Superintendent General of Indian Affairs, November 28, 1881, NA, RG 10, vol. 3665, file 9803, BCARS, B1391 (ICC Documents, pp. 88–95); Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, July 10, 1914 (ICC Documents, pp. 282–319); Isaac Ogden, Indian Agent, Williams Lake Agency, to Royal Commission on Indian Affairs for the Province of British Columbia, October 24, 1914, BCARS, vol. 11020, file 512D, reel B5658, Exhibit K 11, McKenna McBride Commission (ICC Documents, pp. 324–25 and 327–29); Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, November 23, 1914 (ICC Documents, pp. 335–44).

APPENDIX D

SUMMARY OF EVIDENCE REGARDING ADDITIONAL LANDS REQUESTED BY THE ALKALI LAKE BAND, INCLUDING IR 15, 17, AND 18

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
9	IR 15	480 (1914 survey by Ashdown Green)	Jimmy Decker	Jimmy Decker: The applicant had been cutting hay on 7 or 8 acres but was applying for 2 square miles (1,280 acres) for hay and pasture purposes. He had been using the land for 7 years and cut about 8 tons of hay. He had a cabin and a stable with some fencing. He had cleared about 2 acres *and dammed Alkali Lake Creek to* irrigate the land. Agent Ogden: Jimmy Decker cut about 20 tons of hay on this unimproved land which he wanted for its meadows. The land was available and recommended for acceptance. Ashdown Green: A large proportion of this land was brush. About 10 tons of hay were cut on the meadow and there was a good house, stable, and implement shed.	Allowed	Disallowed, as not being reasonably required and as interfering seriously with the development of the grazing facilities of the district
10	IR 16	40 (1914 survey by Ashdown Green)	Alex Kaleste	Agent Ogden: The requested land had a house, stable, fence, and corral. Alex Kaleste desired the land for general farming purposes. The land was available and recommended for acceptance.	Allowed	Allowed

Application	Reserve	Area if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
		49 (1926 survey by D.M. MacKay)		Ashdown Green: This land included houses, a garden, and a spring on land granted to settler Alex McEwen, as well as fields sown to oats on land granted to settler. S.E. Lamont: Another Indian field was vacant and, in Green's opinion, could be given to the Band. D.M. MacKay: The surveyor in 1926 indicated that the Band had for some years successfully cultivated a portion of this area in potatoes, corn, and other garden produce. However, he reported that in more recent years *insufficient water for irrigation purposes had caused the Band to discontinue the cultivation of this tract and at the time of survey the area was overgrown with weeds*.		
11			Bob Johnson	Agent Ogden: Bob Johnson sought this land at Coldwater Springs for its meadows. As the land was unimproved and available, it was recommended for acceptance. Ashdown Green: This land included two meadows, the western one used by the owner of lot 73 (likely a settler), and the eastern one being very wet and not cut in 1915, if ever it was. The land other than the meadows was "worthless."	Disallowed "as not reasonably required"	

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna McBride Commission	Recommendation of Ditchburn and Clark
12			Napoleon Ralleau (Bulleau)	Napoleon Ralleau (Bulleau): The applicant's father used this land before him. The land adjoined a 50 acre parcel of land already owned by the applicant and surrounded by a ranch owned by Johnson (likely C.J. Ware Johnson). The applicant had 7 cattle and 10 horses and, since the land was not irrigable, it might not produce enough hay for his stock in dry years. In good years he could cut about 8 tons of hay. He did not grow anything except hay on this land. Ashdown Green: Not discussed in his report.	Disallowed, as land applied for not being available.	
13			August Martin	August Martin: The applicant already owned 40 acres of land that he purchased and he sought to obtain a further 80 acres lying around his purchased land. He ploughed a quarter of the total area and sowed it to timothy, using the rest for pasture. He cut hay on both areas of land, of which he sold a small amount each year since he had lost 7 horses. Agent Drake: August Martin claimed to have a pre-emption on this meadowland and asked to receive an additional 80 acres adjoining the south side of his meadow. Recommended that the pre-emption be confirmed, but did not consent to the additional 80 acres to be acquired. Ashdown Green: Not discussed in his report.	Land applied for confirmed as being purchased by August Martin. Additional 80 acres disallowed as land applied for not being available.	

Application	Reserve	Area if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
16			Charles Spahan	Charles Spahan: The applicant used the requested land (about one square mile or 640 acres) to cut about 10 tons of hay per year. He had taken up the land himself, his father not having occupied the land before him. He dammed the spring runoff to irrigate the land. He had a good meadow, and he intended to use the rest of the land – covered with small firs and black pine – for pasture. He did not have a house on the land, but he did have a stackyard. His stock consisted of 10 cattle and 58 horses that he ranged on the lands. Agent Ogden: Charles Spahan cut about 10 tons of hay on this land, where he had a good road but no other buildings or improvements. The land was available and recommended for acceptance. Ashdown Green: The requested lands were about 20 acres in size – good meadows but rather wet. The land, "[l]ike all meadows in this part of the country," was liable to flood in the summer and autumn months and "cannot therefore be depended on."	Disallowed as "land being applied for is intermittent small meadows."	

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
15, 17, 18, and 22	**IR 17**	**1,120** (1914 survey by Ashdown Green)	Old Dick Johnson, Tommy Johnson, David Dan, and Louis Kaleste	Old Dick Johnson: The applicant cut about 8 tons of hay on the land, *the centre of which was good land but the perimeter being rocky*. The applicant did not need to irrigate the land as the creek ran through it, but he did irrigate the portion on which he cut hay. *None of the remaining land was irrigable*. The applicant had a house and stable on the land, and it was about half fenced. He kept 5 horses on the land. Tommy Johnson: The applicant requested one square mile (640 acres) that he had used for 8 years for pasture and to cut about 10 tons of hay annually. He had about 20 horses and had improved the land with a house, barn, and some fencing. He dammed the creek to irrigate the land, of which he had cleared 25 acres. He lived on the land most of the time. David Dan: For about 7 years, the applicant had cut about 6 tons of hay on land outside the reserve, where he had a stack yard but no house or fencing. He had 6 cattle.	Allowed	Disallowed, as not being reasonably required and as interfering seriously with the development of the grazing facilities of the district.

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
				Agent Ogden Application 15: Old Dick applied for this meadow and pasture land containing a house, stackyard, and fencing. The land was available. Recommended acceptance of the application be granted to Mrs Michel widow of the deceased Indian who formerly used the land. Application 17: Tommy Johnson cut about 10 tons of hay per year on this land with the remaining land good for pasturage. The land, including a house and stable, was available and recommended for acceptance. Application 18: This meadowland, where David Dan cut about 8 tons of hay, included a good road, house, stackyard, and corral. The land was available and recommended for acceptance. Application 22: Louis Kaleste had cut about 10 tons of hay on this meadow land where he had a house, stable, shed, and stackyard. The land was available and recommended for acceptance. [Oral evidence: Louis Kaleste had cut hay there for about 8 years and wintered his cattle there. The land comprised about 20 acres that Ogden considered to be reasonably required.]		

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
				Ashdown Green: Together with the land comprising application 19, these lands were located on a tributary of Alkali Creek. *In aggregate there were about 128 acres of swamp, the greater part of which was open grassland. In a few places hay could not be cut every year on account of water, but generally this land included good meadows that were of great assistance to the Band.*		
16	IR 11A	110 (1914 survey by Ashdown Green) 131 (1926 survey by J.M. Mackay)	Jimmy Spahan	Jimmy Spahan: Like half the men in the Band, the applicant had no land on the reserve – "the men here are very short of land." To support his wife and 6 children, the applicant desired a piece of land, since he had 4 cattle and 20 horses and had to cut hay on Crown land. Agent Ogden: Jimmy Spahan and his brother Louis cut about 7 tons of hay on this meadowland, where they had a house and stable. The land was available and recommended for acceptance. Ashdown Green: *He considered this land a very poor place, but being contiguous to the reserve (IR 11A) it is of more use to the Indians than to any one else.*	Allowed	Allowed

Application	Reserve	Area (if known) (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
				J.M. MacKay: The surveyor in 1926 indicated that *the meadow areas of this land were beginning to suffer from the spread of* [illegible]		
19			Billy Chelchel	Billy Chelchel: The applicant, who owned 40 horses, cut about 5 tons of hay on land outside the reserve that he had occupied for 2 years. He did not have a house on the land but he did have some fencing. He sought meadowland. Ward Ogden: Billy Chelchel wanted the land for its meadows, where he had been cutting about 7 tons of hay per year "for years. He had a corral, stackyard, and a good road. The land was available and recommended for acceptance." (Oral evidence. The land comprised 15–20 acres of continuous meadow where Billy Chelchel wintered his cattle. Ogden considered the land to be reasonably required.) Ashdown Green: Green considered this land in connection with applications 15, 17, 18, and 22 (see above).	Disallowed as "land applied for not being available."	
20			Scott	Scott: The applicant claimed that the land, although not surveyed, had been promised to him by Commissioner Peter O'Reilly.	Disallowed as "land applied for not being available."	

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
				The land comprised about 100 acres where the applicant cut about 6 tons of hay per year, the rest being good for pasture. He had one cow and 15 horses. The land was naturally irrigated by spring run-off, but no more of the land could have been cultivated through irrigation. The applicant had a stackyard but no house or fencing. Agent Ogden: Scott cut about 6 tons of hay on this land, which he wanted for its meadows and pasture. The land on which Scott had built a stackyard was available and recommended for acceptance. Ashdown Green: This land formed part of the University Reserve. The Indians' statement that this place was reserved by Mr. O'Reilly is untrue. It may have been examined but was certainly never allotted.		
21			Little Dick	Little Dick: The applicant occupied land outside the reserve on which he had been cutting about 10 tons of hay per year for a long time. The land was naturally irrigated with snow melt, although it was not dammed by the applicant. With a dam, the applicant felt that he could raise more hay	Disallowed without reasons	

Application	Reserve	Area if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
				He had 5 horses but had sold his cattle quite a while ago. He had an old cabin and some fencing that he had built long ago, the land having been occupied by the applicant's family for a long time. Agent Ogden: On this meadowland Little Dick cut about 10 tons of hay and had a house and stackyard. The land was available and recommended for acceptance. (Oral evidence: Little Dick lived there part of the year and wintered his cattle there. The land comprised about 20 acres.) Ashdown Green: Green recommended that the application be rejected because this meadow "is a very worthless place, being rocky and full of sink holes; the ground is strongly alkaline and the grass very poor."		
23	IR 9A	**180** (1914 survey by Ashdown Green) **250** (1926 survey by F.M. Mackay)	Antoine Spahan	Agent Ogden: Antoine Spahan had a house, stackyards, stable, and sheds on this land where he cut about 6 tons of hay annually. The land was available and recommended for acceptance. (Oral evidence: The land comprised about 15–20 acres where Antoine Spahan was able to cut about 10 tons of hay. It included a good road built by the Indians, and Ogden recommended its acceptance.)	Allowed	Allowed

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
				Ashdown Green: About 20 acres of this land was swamp grass, but *the surrounding country was considered "valueless" because it was covered with black pine*. Because *the water in the swamp was bad*, Antoine Spahan had located his house and stable close to a spring on section 14 about a quarter mile south of the meadows within the adjacent section 15. D.M. MacKay: The surveyor in 1926 indicated that *the value of this reserve derived from its wild hay meadow*, although he also believed that the hay crop could be greatly increased by clearing the clumps of willows scattered throughout the meadow.		
24			Alkali Lake Band	Chief Samson: The Band sought additional land for timber and pasture. The timber would be used for firewood and fencing. Ashdown Green: Green was instructed to define 20 acres to meet the Band's timber requirements. If the Indians wanted firewood, a strip of 10 chains to the south of IR 1 would suffice, but if it was timber they wanted, a large area would be required because in that country the timber was generally black pine, with fir being small and scattered. He recommended that they obtain a timber permit or a logger's	Disallowed as land applied for not reasonably required.	

Application	Reserve	Area, if known (acres)	Applicant	Evidence	Recommendation of McKenna-McBride Commission	Recommendation of Ditchburn and Clark
				[illegible] thought of [illegible] they [illegible] there would be moved as [illegible]		
243	IR 18	3,992 (1914 survey by Ashdown Green; reduced to 640 by Ditchburn and Clark) 703 (1920 survey by D.M. MacKay)	Alkali Lake Band	Isaac Ogden: The primary purpose of IR 18, in addition to providing some additional pasture, was to connect several of the Band's main reserves – specifically IR 7, 8, and 9 – into one larger landholding. Ashdown Green: Not discussed in his report. D.M. MacKay: The surveyor in 1920 described the approved portion of IR 18 as wooded with Pine and scattered Poplar. He also described the soil as light and dry with occasional rock outcrops.	Allowed	Reduced without reasons

Source: Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, July 10, 1914 (ICC Documents, pp. 282–319); Isaac Ogden, Indian Agent, Williams Lake Agency, to Royal Commission on Indian Affairs for the Province of British Columbia, October 24, 1914, BCARS, vol. 11030, file 5170, reel B8058 (Exhibit K-11); McKenna-McBride Commission (ICC Documents, pp. 324, 325, and 327, 291); Royal Commission on Indian Affairs for the Province of British Columbia, Transcript of Proceedings, November 25, 1914 (ICC Documents, pp. 355–[illegible]); Ashdown H. Green, BCLS, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia, January 10, 1916, NA, RG 10, vol. 11004, file 33-16, part 7 (ICC Exhibit 11, tab [illegible]).

INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION
OF THE
FISHING LAKE FIRST NATION
1907 SURRENDER CLAIM

MARCH 2002

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PART I

INTRODUCTION

This is a report on how a claim – which had been outstanding for over 90 years, pursued actively under the Government of Canada's specific claims process for seven years, and rejected by Canada twice – was, with the assistance of the Indian Claims Commission (ICC), successfully resolved.

The report will not provide a full history of the Fishing Lake First Nation claim. The Commission has discussed the issues involved in the 1907 surrender claim and the inquiry process in its March 1997 publication *Fishing Lake First Nation 1907 Surrender Inquiry*.[1] This report is primarily intended to summarize the events leading up to settlement of the claim and to illustrate the role of the Commission in the resolution process. Although other Commission personnel were involved at various points along the way, it fell to Ralph Brant, as Director of Mediation, to lead the negotiating process.

The Fishing Lake First Nation formally submitted its claim to the Minister of Indian Affairs on April 23, 1989.[2] It argued that the claim should be validated under the federal government's Specific Claims Policy based on allegations that the Fishing Lake surrender of August 9, 1907, was made under duress, undue influence, and through an "unconscionable" surrender bargain. The First Nation further alleged a breach of lawful obligation because Canada failed to comply strictly with the requirements of the *Indian Act* in the manner by which it obtained the surrender.[3]

The claim was rejected on February 12, 1993, on the basis that it failed to establish an outstanding lawful obligation to the Fishing Lake Indian Band as defined in the Specific Claims Policy.[4] In response, the First Nation submitted a supplemental submission on September 29, 1994, updating each of the issues raised in its original submission and raising a new issue of "misrepresentation."[5] The First Nation asserted that the Crown "negligently misrepresented the circumstances surrounding the surrender by failing to properly advise the First Nation members and as a result the First Nation agreed to the Alleged Surrender of 1907."[6] On January 31, 1995, the First Nation submitted a second supplemental submission, arguing that the consent required under Treaty 4 had not been obtained prior to the separation of the Fishing Lake, Nut Lake, and Kinistino reserves and the surrender of 13,170 acres from Fishing Lake Indian Reserve (IR) 89.[7]

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[1] Indian Claims Commission, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219.

[2] Fishing Lake Band, Band Council Resolution, April 23, 1989 (ICC Documents, p. 521), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 223.

[3] Fishing Lake Band Land Claim Legal Submission, delivered by Balfour Moss Milliken Laschuk & Kyle, Barristers and Solicitors (ICC Documents, p. 531), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 223.

After reviewing the supplemental submissions, Canada continued to maintain its position that the First Nation did not provide sufficient evidence to establish a lawful obligation on behalf of the Crown with respect to the surrender.[8]

At the time it submitted its supplemental submissions to the Minister of Indian Affairs, the First Nation also asked the Indian Claims Commission to review Canada's original rejection of its claim.[9] In response, and pursuant to its mandate under the *Inquiries Act*, the Commission proceeded to an inquiry, and the parties were brought together to discuss the claim and to clarify the many related issues, evidence, and opposing legal positions. The Commission's process also allowed for the exchange of documents and provided a forum for full and open discussion.

The inquiry process afforded Fishing Lake First Nation with the opportunity to submit new evidence and arguments, which ultimately caused Canada to reconsider the claim and accept it for negotiation. Confirmation of that recommendation of acceptance followed in an August 27, 1996, letter, which stated:

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[4] Correspondence from Jack Hughes, Research Manager, Specific Claims West, Department of Indian Affairs and Northern Development, to William J. Pillipow (ICC Documents, p. 655), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219 at 223–24.

[5] Supplemental Submission, Fishing Lake Band Specific Land Claim, 1907 Surrender, September 29, 1994 (ICC Documents, pp. 688–795), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219 at 224.

[6] Supplemental Submission, Fishing Lake Band Specific Land Claim, 1907 Surrender, September 29, 1994 (ICC Documents, pp. 756–57), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219 at 224.

[7] Supplemental Submission, Fishing Lake Band Specific Land Claim, 1907 Surrender, January 31, 1995, tabled at ICC Planning Conference, February 2, 1995 (ICC file 2107-23-1), paraphrased from ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219 at 224.

[8] Jack Hughes, Research Manager, Prairie Specific Claims, to Chief Michael Desjarlais and Counsel, June 14, 1995 (ICC file 2107-23-1), paraphrased from ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219 at 224.

[9] Stephen M. Pillipow to Commissioners, Indian Claims Commission, October 13, 1994, enclosing, inter alia, Fishing Lake First Nation Band Council Resolution, September 28, 1994 (ICC file 2107-23-1), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219 at 224.

> This recommendation is based upon the First Nation's submission that an outstanding lawful obligation on the part of the federal government ("Canada") exists within the meaning of the Specific Claims Policy with respect to the 1907 surrender of a portion of the Fishing Lake Reserve No. 89 (the "Reserve Lands"). In particular, this recommendation is made on the basis of the First Nation's allegation that the Reserve Lands were not surrendered in accordance with the requirements of the *Indian Act*

With this letter, the process of negotiating a settlement began. At the request of the First Nation and with the concurrence of Canada, the Commission agreed to act as facilitator.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. It was established by Order in Council on July 15, 1991, followed by the appointment of Harry S. LaForme as Chief Commissioner. The ICC became fully operative with the appointment of six Commissioners in July 1992.

The Commission's mandate is twofold: it has the authority (1) to conduct inquiries under the *Inquiries Act* into specific land claims that have been rejected by Canada, and (2) to provide mediation services for claims in negotiation.

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or where the Crown's lawful obligations have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

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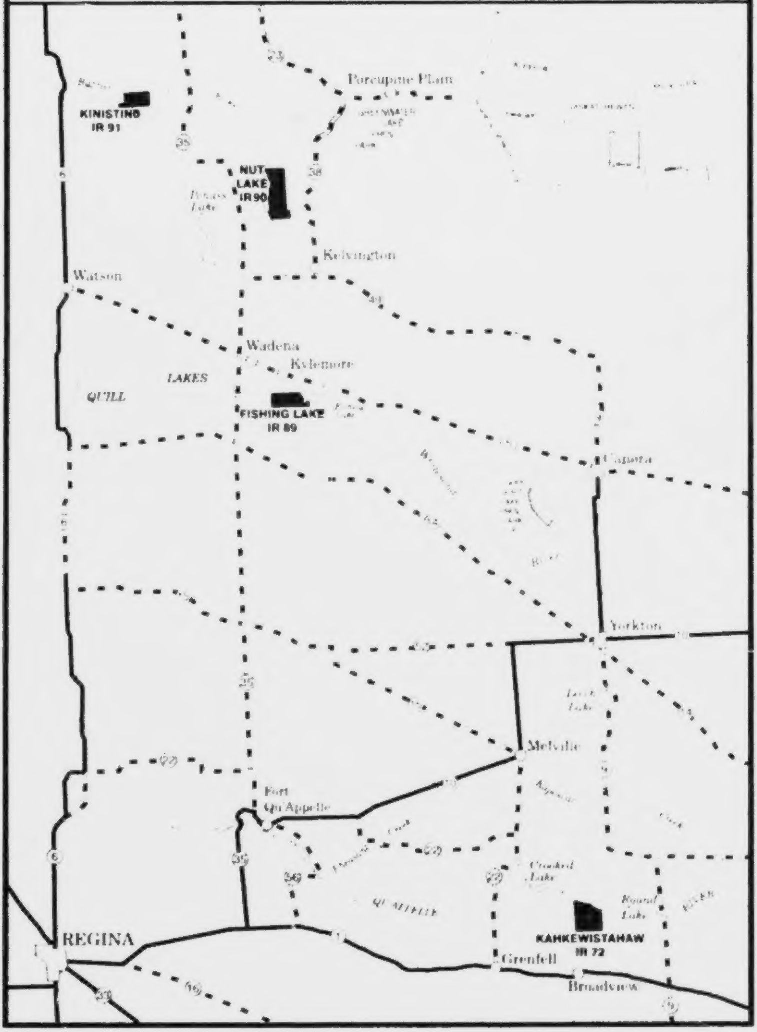
16 Jack Hughes, Research Manager – Prairie Provinces, to Chief Michael Desjarlais and Council, May 7, 1996; included in Kim Kobayashi, Counsel, to Kathleen Lickers, Associate Counsel, Indian Claims Commission, May 28, 1996, and reproduced as Appendix B in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219 at 242-43.

Claim Area Map


Porcupine Plain
KINISTINO
IR 91
NUT
LAKE
IR 90
Kelvington
Watson
Wadena
Kylemore
QUILL
LAKES
FISHING LAKE
IR 89
Canora
Yorkton
Melville
Fort
Qu'Appelle
Crooked
Lake
Round
Lake
RIVER
KAHKEWISTAHAW
IR 72
REGINA
Grenfell
Broadview
23
35
38
6
49
22
10
56
9
33

These latter claims are the focus of the ICC's work. Although the Commission has no power to accept or force acceptance of a claim rejected by Canada, it does have the power to thoroughly review the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, gather information, and subpoena evidence if necessary. If the inquiry concludes that the facts and the law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian Affairs and Northern Development that a claim be accepted.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of parties in negotiation. From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II

A BRIEF HISTORY OF THE CLAIM

The historical context of this claim has been described at length in the March 1997 *Fishing Lake First Nation 1907 Surrender Inquiry Report* of the Commission.[11] A brief summary will suffice here. On August 24, 1876, at Fort Pelly in what was then the North-West Territories, the Yellow Quill Band adhered to Treaty 4. In September 1881, John C. Nelson, Dominion Land Surveyor, surveyed reserves for the Band at Fishing Lake and Nut Lake.

Soon after the last reserve was surveyed, the Canadian Northern Railway applied for, and was granted, a right of way over a portion of the Fishing Lake reserve. In 1905, the company requested that the northern end of the Fishing Lake Reserve be opened for settlement. After a preliminary review of the status of the Fishing Lake reserve, the Department of Indian Affairs agreed to pursue the railway company's request and dispatched the Reverend Dr John McDougall of Calgary to do "special work for the Department in negotiating the surrender of portions or the whole of certain Indian reserves," in this case Fishing Lake.

Records indicate that the Reverend Dr McDougall (accompanied by Indian Agent H.A. Carruthers) met with the Fishing Lake First Nation in October 1905 and again in July 1906. McDougall's report of the latter meeting offers no indication of the position of the Fishing Lake First Nation on the matter of surrender, but it does reveal how the implementation of a proposed amendment to the *Indian Act* would allow the department to offer 50 per cent of the anticipated proceeds of sale to the First Nation as an inducement to the surrender. Records also show that there were very few members of the First Nation on the reserve at the time of McDougall's first visit and point to an attempted meeting with members of Nut Lake, which was not successful because most were not on the reserve at the time of the visit.

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[11] Full documentation of the details summarized here is found in ICC, *Fishing Lake First Nation Report on 1907 Surrender Inquiry* (Ottawa, 1997), reported (1998) 6 ICCP 219.

In the end, McDougall's proposed surrender was rejected at a subsequent meeting with Fishing Lake on August 2, 1906, primarily on the basis that the department had also attempted to have members of the adjacent Nut Lake and Kinistino First Nations share equally in the proceeds received from the sale of the surrendered property at Fishing Lake. Fishing Lake First Nation claimed that the people on each reserve viewed themselves as independent from the others while Canada continued to deal with them as one band.

With the Canadian Northern's request still outstanding, the department moved to finalize the land allotments provided to the three reserves under Treaty 4 on the understanding that, once this work was completed, efforts would begin to establish them into three separate and distinct bands with exclusive rights to their own reserves.

By August 1907, following the signing of "separation agreements" to split the Fishing Lake, Nut Lake, and Kinistino Bands, the department secured the surrender of 13,170 acres from Fishing Lake First Nation, and each band member was paid $100 (nine members affixed their marks to the surrender document). Of note is the fact that Inspector W.M. Graham, tasked with obtaining the surrender on behalf of the department, reported to his superiors that he was "surprised they (members of Fishing Lake) were not at all anxious to sell. In fact, I had given up hope of getting the surrender, till just before starting for home a number of the Band came over and said they were willing to sign the surrender. A meeting was called and the whole Band voted for the surrender."

The surrender and proposed sale of the land was approved by Order in Council on September 7, 1907, and most of the land was sold at three public auctions in 1909 and 1910.

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

The Commission's role in the process of settling the claim would normally have ended as soon as its inquiry was completed and the claim of the First Nation accepted for negotiation by Canada. On September 30, 1996, however, counsel for the First Nation wrote to the Commission asking if it would consider acting as a facilitator for the negotiations.[12] In December 1996, the Commission offered to assist as a neutral facilitator, providing Canada agreed.

Facilitation focused almost entirely on matters relating to process. The Commission's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish mutually acceptable agendas, venues, and times for the meetings. At the request of the parties, the Commission was also responsible for mediating disputes, assisting the parties in arranging for further mediation, and acting as a coordinator for the various studies undertaken by the parties to support negotiations.

Although the Commission is not at liberty to disclose the discussions during the negotiations, it can be stated that Fishing Lake First Nation and representatives of the Department of Indian Affairs and Northern Development worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at a mutually acceptable resolution of the First Nation's claim.

Loss-of-use studies and land appraisals were conducted to provide the information required for a claim valuation and subsequent negotiations. Specifically, independent consultants assessed the losses of use from traditional activities, agriculture, forestry, and mining to estimate the net economic losses to the First Nation as a result of the 1907 surrender. The traditional activities practised and the burial site on the land in question, the amount of compensation for the losses, and the final payment schedule were all issues that needed to be resolved between the parties.

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[12] Stephen M. Pillipow, Counsel for Fishing Lake First Nation, to Ron Maurice, Commission Counsel, Indian Claims Commission, September 30, 1996 (ICC file 2107-23-01).

After intense and elaborate negotiations, Canada made an offer to settle.[13] The First Nation accepted, and a Settlement Agreement was finalized following much correspondence, conference calls, meetings, and revised drafts.

On January 17, 2001, the Settlement Agreement was initialled by the parties and members of Fishing Lake First Nation voted to ratify their settlement on March 12, 2001.

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[13] A.J. Gross, Chief Federal Negotiator, Department of Indian Affairs and Northern Development, Specific Claims Directorate, to Chief Allen Paquachan, Fishing Lake First Nation, August 21, 2000 (ICC file 2107-23-01).

PART IV

CONCLUSION

The Fishing Lake First Nation claim, in a pattern similar to the majority of specific land claims outstanding in Canada, took some 10 years to resolve. Although the Commission was involved as mediator, it has no authority to force a settlement or to impose one. The credit for settling this claim belongs to the parties. However, the outcome of the negotiations indicates the Commission's potential to advance the settlement of claims. For approximately seven years, efforts by the First Nation to have its claim validated and settled were unsuccessful. The Commission's inquiry process was able to produce movement to the extent that the First Nation, encouraged by the results of that process in the advancement of its claim, asked the Commission to maintain an ongoing role in the negotiation.

That added value is critical in a process that continues to be plagued by the inability of the parties at the table to maintain consistency in negotiations, an inability caused in part by high turnover rates in negotiators and legal counsel. The Commission's mediation service helps the parties keep the focus and momentum in the negotiations, and can also serve as an essential "corporate memory" at the table.

Within the context of the Fishing Lake claim, the Commission was also able to help counsel for the parties resolve stalemates involving the interpretation of legal principles and case law – issues that often contribute to delays or breakdowns in the negotiations. This assistance provides further indication of the Commission's capability of fulfilling an important role beyond actual mediation at the table, not as an advocate for either side, but for the negotiations themselves.

FOR THE INDIAN CLAIMS COMMISSION

Phil Fontaine
Chief Commissioner

Dated this 27th day of March, 2002.

INDIAN CLAIMS COMMISSION

CHIPPEWAS OF THE THAMES FIRST NATION INQUIRY
CLENCH DEFALCATION CLAIM

PANEL

Chief Commissioner Phil Fontaine
Commissioner Daniel J. Bellegarde

COUNSEL

For the Chippewas of the Thames First Nation
Paul Williams

For the Government of Canada
Michelle Brass

To the Indian Claims Commission
Kathleen N. Lickers

MARCH 2002

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PART I

INTRODUCTION

BACKGROUND TO THE CLAIM

This claim dates back some 150 years to the mid-19th century. The Chippewas of the Thames First Nation claim that moneys owed to the First Nation from the sale of surrendered lands were wrongfully appropriated around 1854 by Joseph Brant Clench, an officer with the Indian Department.[1] In 1974, some 27 years ago, the Union of Ontario Indians brought the matter of the "Clench Defalcation" (as the claim is known) to the attention of the then Minister of Indian Affairs, Judd Buchanan.[2] On February 21, 1975, Mr Buchanan informed Delbert Riley, the Acting Director of the Treaty Research Program for the Union of Ontario Indians, that, in light of a final release signed by the Chiefs and principal men of the Chippewas in 1906, the Government of Canada had found no basis for negotiating the claim.

On August 4, 1998, the Chippewas of the Thames First Nation (the "claimant") passed a Band Council Resolution requesting that the Indian Claims Commission (ICC) conduct an inquiry into the rejection of the claim by Canada. Specifically, the claimant alleged that the Chippewas of the Thames had surrendered approximately 5,000 acres of reserve land to the Crown in 1854, but that the proceeds of sale from that surrender and other sales dealt with by J.B. Clench did not make their way to the Chippewas and had been the subject of a defalcation. Rather than seeking an inquiry *per se* as the Band Council Resolution authorized, however, the Chippewas of the Thames suggested to the Commission that a review of the research materials of both Canada and the claimant could assist the claimant in understanding why its claim had been rejected by Canada, and would perhaps enable the parties to decide whether mediation would be necessary or appropriate.[3] This review was jointly carried out and ultimately led Canada to reconsider the rejection of the First Nation's claim. Canada then offered to accept this claim for negotiation – an offer the First Nation has accepted.

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[1] The Chippewas of Sarnia, Chippewas of Kettle and Stony Point, and Walpole Island First Nations have made similar allegations.

[2] Delbert Riley, A/Director of Treaty Research Program, Union of Ontario Indians, to Judd Buchanan, Minister of Indian Affairs, December 2, 1974 (ICC file 2105-8-2).

In view of the parties' decision to enter into negotiations, no further steps have been taken by the Commission to inquire into the First Nation's claim. We make no findings of fact. This report, which contains a brief summary of the First Nation's claim and the chronology of events leading up to Canada's decision, is simply meant to advise the public that the claim has been accepted for negotiation under the Specific Claims Policy.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Indian Specific Claims Commission was established through a federal Order in Council dated July 15, 1991, as an interim body intended to assist First Nations and Canada in resolving specific claims. The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. It directs

> that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[4]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[5] In considering a specific claim, the Commission must make its assessment within the guidelines provided in *Outstanding Business*:

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[3] Jody Kechego, Chippewas of the Thames First Nation, to Indian Claims Commission, September 22, 1997 (ICC file 2105-8-2).

[4] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[5] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85 (hereafter *Outstanding Business*).

> The government's policy on specific claims is that it will recognize claims by Indian Bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

At the request of a First Nation, the Commission can conduct an inquiry into a specific rejected claim. Although the Commission has no authority to force acceptance of a claim rejected by the government, it can review the claim and the reasons for its rejection thoroughly with the claimant and the government. As well as conducting inquiries into rejected claims and into disputes over the application of compensation criteria, the ICC is also authorized to provide mediation services at the request of the parties to a specific claim to assist them in reaching an agreement.

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6 *Outstanding Business*, 20, reprinted in (1994) 1 ICCP 171 at 179–80.

PART II

THE INQUIRY

The Commissioners' terms of reference enable them to choose how to proceed in carrying out their duties. Following the receipt of a claim, the Commission requests all of Canada's documents and produces a claim assessment report. A planning conference is scheduled, and timelines may be required of all parties to ensure a timely process.

During a planning conference, representatives of the parties, including their legal counsel, meet with Commission representatives to review and discuss the claim, identify outstanding issues, and plan how to proceed. Further timelines are generally agreed to by the parties during the planning conference relating to, for example, the exchange of information, clarification of positions, and completion of research.

On August 25, 1998, the ICC advised the Specific Claims Branch of DIAND that the Chippewas of the Thames First Nation had requested an inquiry. The ICC asked that Canada transfer copies of all documents in its custody and control relating to the assessment of the claim.[7] A planning conference was scheduled, and representatives of the parties were informed that the main objectives of the conference would be to define the scope of the inquiry accurately, as well as to discuss the issues and, where possible, to narrow them.[8]

The first planning conference was held on December 14, 1998. At that time, the parties agreed that their first step would be to conduct joint research on the specific issues relating to the Clench Defalcation. Among other things, the parties agreed that a second planning conference would be held in February 1999.[9]

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[7] Ron S. Maurice, Commission Counsel, ICC, to Paul Cuillerier, Director General, Specific Claims, August 25, 1998 (ICC file 2105-8-2).

[8] Ralph Keesickquayash, ICC, to Paul Williams, Counsel for the Chippewas of the Thames, and Robert Winogron, DIAND Legal Services, October 20, 1998 (ICC file 2105-8-2).

[9] Ralph Keesickquayash, ICC, to Paul Williams, Counsel for the Chippewas of the Thames, and Robert Winogron, DIAND Legal Services, November 16, 1998 (ICC file 2105-8-2).

Robert F. Reid, the Legal and Mediation Advisor to the ICC, chaired that second meeting.[10] The parties agreed that Joan Holmes and Associates, a historical research firm located in Ottawa, would be approached to conduct joint research. Further conference calls were held on April 16 and June 28, 1999, to finalize the terms of the Holmes research project, as well as to update the status of other commitments made by the parties during the first two planning conferences. In April, at the request of the parties, the ICC agreed to monitor the joint research to ensure its independence and compliance with the terms of reference and timelines agreed to by the parties.

An interim historical research report was completed by Joan Holmes and Associates on October 4, 1999. At a third planning conference held on October 18, 1999, at the Commission offices, the parties indicated they were generally satisfied with the progress made. Having reviewed the new research, the claimant restated its claim.[11] A fourth planning conference was held in December 1999 at which the parties agreed to consider the suitability of the Holmes Report as an agreed statement of facts for purposes of an inquiry.

Following the fourth planning conference, the claimant provided a written submission to Canada on February 7, 2000, outlining its legal position. At a fifth planning conference, held on February 29, 2000, in Ottawa, Canada agreed it would review the claim and submissions made by the First Nation and would respond with its own position and potential list of issues by April 14, 2000. From that point forward, however, the progress of the claim began to stall.

On April 13, 2000, Canada advised that, with the agreement of the parties, Canada would not provide a position at that time.[12] During a teleconference with the parties on April 28, 2000, the legal counsel for DIAND advised that he was turning the file over to another lawyer. In May 2000, DIAND's new lawyer told the ICC that she had completed her opinion and that the matter would be dealt with internally no later than June 29, 2000, with a negotiator to be appointed sometime in August or September 2000. Counsel for the claimant agreed to this timetable, provided Canada's commitments were kept.[13]

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[10] In light of interests claimed by other First Nations, observers were invited to attend the second planning conference; those present included representatives from the Chippewas of Kettle and Stony Point and the Walpole Island First Nation.

[11] It alleged, among other things, that the Chippewas of the Thames had been compelled to hire its own lawyer in 1885 to recover moneys owed but had been forced to abandon court action in 1893 when the Crown refused to permit them to use their trust funds for litigation. Thus, in addition to a claim that the Chippewas of the Thames were entitled to an accounting and recovery of moneys owed as a result of the "Clench Defalcation," the claimants alleged that they had been compelled to accept an unconscionably small settlement of the moneys owing to them and that the settlement and release obtained by the Crown in 1906 represented "an unfair taking advantage by a fiduciary." Restatement of Claim, Chippewas of the Thames, November 15, 1999.

[12] Robert Winogron, DIAND Legal Services, to Paul Williams, Counsel for the Chippewas of the Thames, and Ralph Keesickquayash, ICC, April 13, 2000 (ICC file 2105-8-2).

In September 2000, DIAND advised the ICC that the Clench matter would not be reviewed by the Claims Advisory Committee until mid-October 2000.[14] Later, DIAND counsel informed the parties and the ICC that the review had finally been conducted on October 26, 2000, but that the file had been returned to her for further work because of a "supplementary issue." Unfortunately, no explanation was provided as to what the new issue was or what further work might be involved. In reference to these developments, the claimant expressed concern that new research was being done independently by one party in response to what had been a joint research report.

DIAND informed the Commission that Canada's formal response to the claim would be provided by the end of February 2001. In March 2001, with no further progress made, the ICC requested a meeting of the parties so that Canada could update the First Nation and the ICC as to the status of the file.[15] At that meeting, held on March 26, 2001, Canada indicated that the primary reason for the ongoing delay was a request from the minister's office for further information concerning the claim, which required additional research to be done. As well, Canada informed the ICC and the claimant that the analyst responsible for the file and another official with DIAND who had been working on the file had moved on to other positions, causing further delay.

In April 2001, with no position yet forthcoming from Canada, the First Nation indicated it was considering requesting an inquiry into the claim. At a meeting held on May 14, 2001, the First Nation again expressed frustration at the delays caused by the turnovers in government personnel.

A further planning conference, tentatively scheduled for June 18, 2001, was cancelled in light of the apparent lack of progress on the claim. However, on the day the planning conference was to have been held, the Minister of Indian Affairs wrote to Chief Joe Miskokomon of the Chippewas of the Thames First Nation to inform him that Canada had accepted the claim for negotiation. On June 26, 2001, Barry Dewar, the Acting Assistant Deputy Minister of Claims and Indian Government with DIAND, wrote to Chief Miskokomon confirming the terms of Canada's offer to negotiate the claim.[16]

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[13] Paul Williams, Counsel for the Chippewas of the Thames, to Ralph Brant, Director of Mediation, ICC, May 18, 2000 (ICC file 2105-8-2).

[14] Letter confirming conversation with Ralph Brant, Paul Williams, Counsel for the Chippewas of the Thames, to Ralph Brant, Director of Mediation, ICC, September 20, 2000 (ICC file 2105-8-2).

[15] Chris Angeconeb, Associate Legal Counsel, ICC, to Paul Williams, Counsel for the Chippewas of the Thames, and Michelle Brass, DIAND Legal Services, March 15, 2001 (ICC file 2105-8-2).

[16] Barry Dewar, DIAND, to Chief Joe Miskokomon, Chippewas of the Thames, June 26, 2001 (see Appendix C).

The Commission is extremely pleased that Canada has agreed to negotiate this longstanding claim and that the mediative processes and joint research resulting from the planning conferences ultimately contributed to Canada's decision. At the same time, we think it unfortunate that the resolution of the claim was delayed for as long as it was once the claim entered ICC processes.

It is reasonable for some delays in scheduling to take place in the progress of a claim. Although these are often frustrating for the claimant, they are to be expected, given the many participants in a claims process and the need to coordinate schedules and internal reviews. As well, turnovers within a large government department are perhaps inevitable. In this instance, however, the many internal review stages within DIAND, combined with changes in personnel, meant that Crown representatives failed to meet commitments they had agreed to in the planning conferences. Needless to say, this situation was a source of considerable frustration for the claimant and placed counsel for DIAND in the uncomfortable position of having to explain why the department had made commitments, both during and before her tenure on the file, which it proved unable to meet.

As a result of the many delays, as well as the limited information Canada provided as to why they were occasioned, a process which the claimant had entered in the express hope that it would avoid the need for an inquiry very nearly culminated in one. Although the outcome was ultimately satisfactory, we can only emphasize that the effectiveness of the planning conference and mediation process depends on parties keeping their commitments within the agreed timelines.

In light of Canada's acceptance of the claim, the Commission has suspended further action on it, although we anticipate continuing involvement in our mediative role. A summary of the planning conferences and the balance of the record is set forth as Appendix A of this report. Because no inquiry was conducted, the Commission has not conducted any research or reviewed the research report and materials prepared by Joan Holmes and Associates for accuracy or completeness. For the same reason, the Commission has made no findings of fact. We have, however, for the purposes of providing background to the claim, attached a copy of the executive summary of the Holmes Report, which was reviewed and approved by the parties, as Appendix B to our report.

Canada's letters of acceptance of the claim are appended as Appendix C to our report.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde

Phil Fontaine
Chief Commissioner

Daniel J. Bellegarde
Commissioner

Dated this 27th day of March, 2002.

APPENDIX A

CHIPPEWAS OF THE THAMES FIRST NATION INQUIRY
CLENCH DEFALCATION CLAIM

1 Planning conferences

The Commission held six planning conferences:	December 14, 1998
	February 12, 1999
	October 18, 1999
	December 10, 1999
	February 29, 2000
	March 26, 2001

2 Content of formal record

The formal record for the Chippewas of the Thames Clench Defalcation Claim consists of the following materials:

- "Chippewas of the Thames: Report on the J.B. Clench Defalcation," prepared by Joan Holmes and Associates for the Chippewas of the Thames and the Department of Indian and Northern Affairs, revised February 2000
- Document Index, Joan Holmes and Associates, December 1999, together with the following: Map Index, List of Records Researched, Documents 1-306, Collection of Maps

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX B

CHIPPEWAS OF THE THAMES – REPORT ON THE J.B. CLENCH DEFALCATION

CLENCH DEFALCATION – EXECUTIVE SUMMARY

This report contains all the known information on the loss of Indian moneys that were under the administration of Indian Superintendent J.B. Clench. Known as the Clench Defalcation, this misappropriation of funds was investigated and acknowledged by Crown officials.

Part of the misappropriated funds were payable to the Chippewas of the Thames for lands sold pursuant to an 1834 surrender of Lots 10–16 in Ranges 2, 3 and 4 Caradoc Township (Surrender #37). These lands had been set aside for the Chippewas of the Thames according to an 1822 Treaty (Treaty #25).

In 1845 J.B. Clench was appointed agent for the sale of Indian lands belonging to several First Nations in southern Ontario, including the Chippewas of the Thames. In 1846 Clench secured his position with a bond agreement and three bonds: his own £1000 bond, a £500 bond from W.H. Cornish, and a £500 bond from Dennis O'Brien. Before Clench assumed responsibility for managing the Chippewa land sales, the sale and collection of money had been administered by the Crown Lands Department.

In 1854, the Governor General ordered an investigation into Clench's management of land sales, after receiving complaints regarding his handling of some particular transactions.

Accountant Thomas Worthington and Deputy Receiver General Anderson examined Clench's accounts and declared them "almost useless." They also reported that at that time Clench was confined to his bed by poor health and his mental processes were diminished. In their final report, Worthington and Anderson determined that Clench owed a total of £7577.8.11 ($30,308) (exclusive of interest and deduction of agent's fees). Of this amount, £1109.15.3 ($4,437) was missing from the sale of lands surrendered in 1834 by the Chippewas of the Thames.

Report prepared by Joan Holmes & Associates, Inc., for the Chippewas of the Thames and Indian and Northern Affairs Canada, revised February 2000. This summary is reproduced exactly as it was approved by the parties.

Upon receiving Worthington and Anderson's report in October 1854, the Governor General dismissed Clench from his office as Superintendent and Land Agent and directed the Attorney General, John A. Macdonald, to initiate legal proceedings against Clench and his sureties (O'Brien and the Cornish heirs) and to obtain an injunction against the estates and property of Mrs. Serena Clench and their son Leon Moses Clench.

According to known historical information the following actions were taken to recover the misappropriated money.

The Attorney General retained S. Richards as an Agent, who initiated proceedings in the Court of Chancery in Toronto in 1855. The investigation of Worthington and Anderson was considered by the Court which found that there was sufficient evidence against Col. J.B. Clench, his wife Serena J. Clench, and their son Leon Moses Clench to file *lis pendens* against their properties. *Lis pendens* were filed against their known properties in July 1855.

A second court proceeding was held in August 1855 when it was determined that family members owned additional properties that were being held by trustees J.E. Small and J. Prince. A second *lis pendens* was filed for the additional lands.

A *Writ of Extent* was issued against J.B., Serena and Leon Moses Clench for their property. Serena and Leon Moses Clench and the two trustees disputed their complicity in any default, while J.B. Clench signed an indenture releasing to the Queen any interest he might have in a group of properties.

These properties under *lis pendens* and surrendered by J.B. Clench were valued by Worthington at a total of approximately £5950 ($23,800).

A letter from S. Richards states that Attorney General John A. Macdonald instructed him sometime in 1855 not to pursue the recovery of the bonds posted by Clench and his two sureties. Despite an extensive search, no instructions to this effect could be located.

Sometime between January 1856 and April 1857, the Agent S. Richards recovered approximately £600, by having some of Clench's personal property seized by the Sheriff. No further action was taken to seize any other assets. The properties under *lis pendens* continued to be occupied, rented, and mortgages were paid, lands divided and sold. J.B. Clench died insolvent in February 1857.

In 1880 a solicitor for the Department of Indian Affairs gave his opinion that the Crown did not hold clear title to the properties as no proceedings were taken under the *Writ of Extent* to determine if the properties were indeed purchased with the misappropriated funds.

Richard Bayly was retained by the Department of Justice to investigate. He opined that the *lis pendens* could be revived but was doubtful that the Crown could prove that the lands had been purchased with the misappropriated land sales money. Based on Bayly's 1882 report the Deputy Minister of Justice recommended against reviving the 1855 court proceedings and the Deputy Minister of Indian Affairs concurred.

– In 1885 the Chippewas of the Thames retained D. Macmillan to obtain information on the collection of land sales money. The Department indicated that the Carey Sale ($1,260) had not been accounted for by Clench. The Chippewas of the Thames retained another lawyer, William Gordon, the following year and were informed that the matter of the Clench defalcation was being investigated.

William Scott of the Indian Department was instructed to investigate the status of the Clench account. He reported in 1888 that the entries in the suspense account were somewhat difficult to follow, that the opening balance of $743.40 was unexplained and that charges against the account had been made to pay Chancery costs leaving a balance of $614.40 in 1860, which collected interest from 1865. A payment of $258 was made to the Wyandots in 1874; otherwise the only activity in the account was the accumulation of interest.

– In 1888 the matter was again referred to the Department of Justice, at which time the Deputy Superintendent General of Indian Affairs took the position that recovery of the capital and interest should be a claim against the old province. The case was one of many in arbitration between the Dominion and the Old Province.

During this period, efforts by the Clench family and heirs to have *lis pendens* lifted were rejected under advice from the Department of Justice who feared that it would prejudice the claim of the Dominion against the Old Province.

– While the matter of the Clench Defalcation was being reviewed by the Board of Arbitrators, Chief John Henry of the Chippewas of the Thames was pressing the Department for settlement of their claims for lost lands sales money. Consequently, their lawyer A.G. Chisholm filed a writ in the Exchequer Court in May 1895 seeking satisfaction for funds related to the sale of the Carey lands ($1,260) and other money being the Chippewas' share of the misappropriated Clench funds (approx. £1005.13.2 or $4,021) with interest as well as a claim related to Muncey occupation of the Caradoc Reserve.

The Superintendent General considered Chisholm's Petition of Right recommending in January 1894 that while the issues related to the Clench defalcation could not be dealt with while the matter was before the Board of Arbitrators, the government should settle the Muncey trespass matter by agreeing to a settlement of $16,000 and 500 acres of land. This memorandum was not approved by the Privy Council, however, two years later a settlement was finally made for $17,640 by an Order-in-Council dated April 28, 1896. This O.C. explained that the Department of Justice had referred the Petition of Right to the Lieutenant Governors of Ontario and Quebec asking if a fiat should be granting. As they declined to offer an opinion, the Minister of Justice decided that a fiat could not be properly withheld if a settlement was not reached. As the settlement was reached in April 1896, the case never went before the court.[1]

According to the Deputy Superintendent General, a fiat was issued in March 1895 allowing the Clench issues to be taken before the Exchequer Court.

The Dominion's case was submitted to the Board of Arbitrators in April 1895 and Ontario made its reply the following May. It was determined that Clench was an officer of the Imperial Government and that the Dominion had no further case against the Province of Ontario. The Acting Deputy Minister of Justice reasoned that the *lis pendens* could now be discharged and that the Imperial Government could be approached to settle the claim.

The Deputy Superintendent General then recommended either presenting the claim to the Imperial Government or appealing to the Dominion to make a settlement "as a matter of grace to these wards of the Crown."

Subsequently in November 1896, Chisholm offered to settle the Clench defalcation claim for $15,000. The offer was made on a "without prejudice basis" as the matter was in the Exchequer Court. The Chippewas of the Thames approved of the proposed settlement; however, the Department would not settle and the Deputy Superintendent recommended that the matter be settled in the Exchequer Court. The Crown did not believe they could recover the funds from the Imperial Government citing other failed attempts and the lapse of time. Correspondence between the Department, Chippewas of the Thames and Chisholm indicates that the Band and their lawyer believed that an agreement had been made while the Department did not.

During this period the Department of Indian Affairs was disputing the payment of Chisholm's accounts for services to the Chippewas of the Thames, finally ordering in May 1899 that no payments should be made to him without the express consent of the Superintendent or Deputy Superintendent.

Upon having the proposed $15,000 settlement refused Chisholm declared that he would advise his clients to "apply to the court to fix a time for the trial of this action without more delay." In October 1899 Chisholm was informed that the Department would not authorize the disbursal of any more funds belonging to the Chippewas of the Thames for the purpose of proceeding to trial.

The Superintendent General was advised by his private secretary, J.A.J. McKenna, that in his opinion the facts of the Clench defalcation justified bringing the case to court but questioned the fairness of the Chippewas paying all of the legal costs.

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[1] There is some correspondence related to the payment of a $5,000 fee to Chisholm for his work on this settlement. It is interesting in terms of information related to Chisholm's relationship to Chippewas of the Thames, his dedication in achieving settlement of their claims, and the discouragement the First Nation experienced in trying to obtain justice.

While Chisholm prepared to go to trial by requesting documents for examination for discovery, the Department of Justice gave an opinion on the items which had been raised in Chisholm's Petition of Right. The Deputy Minister stated that the mortgage money that had been collected on one of the Clench properties should be paid to the interested bands with interest accrued from the time of payment, that the government could demand the unpaid balance owing on the mortgage, the petition of right could be amended as only part had been settled (i.e. the Munsey issue), and that settlement was a good option. Furthermore, he stated that it was the duty of the Department to ensure that Band funds were not spent in useless litigation.

Consequently in March 1900, an offer was made to settle the claim by distributing the funds in the Clench deficit account which amounted to $2,165.94. Chisholm refused that offer and the Chippewas of the Thames instructed Chisholm to pursue the claim in the courts in May 1900.

In 1905 Deputy Superintendent Pedley ordered that money due on the "Agassiz mortgage," one of the Clench properties be collected at once. This instruction was issued in the context of a request to discharge an outstanding mortgage on one of the Clench properties.

– In 1906 Chisholm met with Deputy Superintendent Pedley and agreed that the balance of the Clench account should be paid to the interested bands. Chisholm had already obtained the concurrence of M.K. Cowan, MP, who was working on behalf of the Wyandots. Chisholm undertook to communicate with and obtain releases from the Wyandots and the Chippewas of Sarnia as well as his own clients. The amount to be paid in the settlement was $7,355.67 ($4,731.19 realized from a Clench mortgage plus $2,624.48 in the Clench fund).

The release of demands was signed by representatives of the three bands and submitted to Pedley in March 1906. The $7,355.67 was to be divided in proportion to their interest in the original defalcation.

The Memorandum to Council described the case and recommended that the money realized from the payment on the Clench mortgage be disbursed from consolidated revenue and together with the Clench fund, the total amount of $7,355.67 be distributed to the interested bands. The Superintendent General also recommended that Chisholm be paid a $500 fee for his work out of the available funds in addition to his regular costs. The O.C. approved the payments to the Bands, but did not mention the fee to Chisholm.

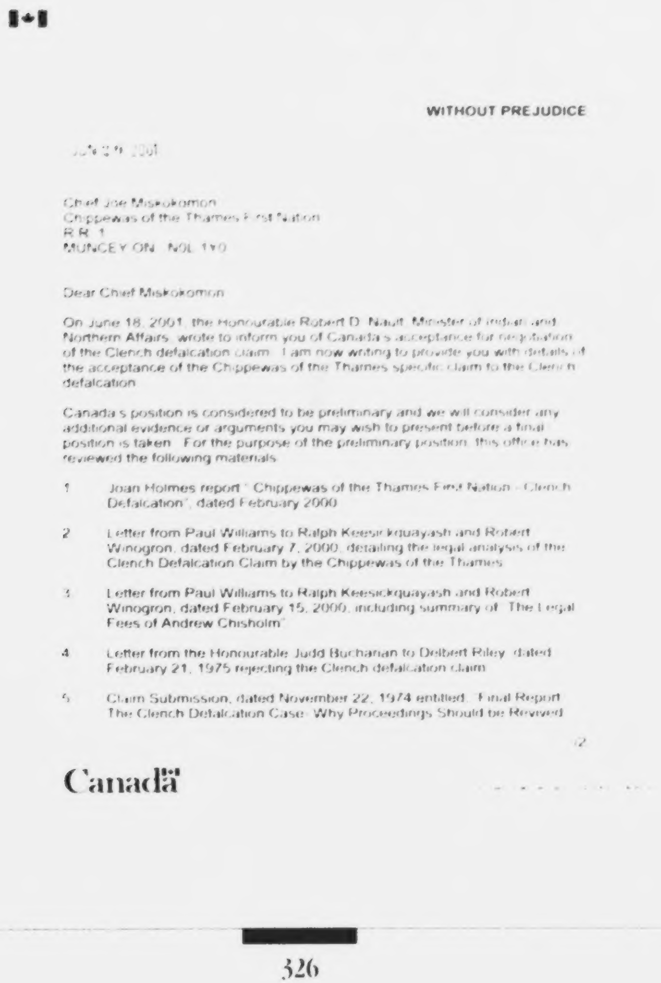
Chisholm's ordinary legal costs were paid out of the fund for a total of $577.58 (502.58 + 75.00). He later received the $500.

The available funds were distributed as follows

First Nation	Original Owing	Proportion	Settlement	Proportion
Chippewas of the Thames	$ 5,282.64	18	$ 1,189.51	17.7
Wyandots of Anderdon	$ 17,738.98	61	$ 4,185.07	62.1
Chippewas of Sarnia	$ 6,056.94	21	$ 1,363.87	20.2
Total	**$ 29,078.56**	**100%**	**$ 6,738.45**	**100%**

APPENDIX C

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM



WITHOUT PREJUDICE

JUN 29 2001

Chief Joe Miskokomon
Chippewas of the Thames First Nation
R.R. 1
MUNCEY ON N0L 1Y0

Dear Chief Miskokomon

On June 18, 2001, the Honourable Robert D. Nault, Minister of Indian and Northern Affairs, wrote to inform you of Canada's acceptance for negotiation of the Clench defalcation claim. I am now writing to provide you with details of the acceptance of the Chippewas of the Thames specific claim to the Clench defalcation.

Canada's position is considered to be preliminary and we will consider any additional evidence or arguments you may wish to present before a final position is taken. For the purpose of the preliminary position, this office has reviewed the following materials:

1. Joan Holmes report "Chippewas of the Thames First Nation - Clench Defalcation", dated February 2000
2. Letter from Paul Williams to Ralph Keesickquayash and Robert Winogron, dated February 7, 2000, detailing the legal analysis of the Clench Defalcation Claim by the Chippewas of the Thames
3. Letter from Paul Williams to Ralph Keesickquayash and Robert Winogron, dated February 15, 2000, including summary of "The Legal Fees of Andrew Chisholm"
4. Letter from the Honourable Judd Buchanan to Delbert Riley, dated February 21, 1975 rejecting the Clench defalcation claim
5. Claim Submission, dated November 22, 1974 entitled "Final Report The Clench Defalcation Case: Why Proceedings Should be Revived"

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6. Letter from Delbert Riley to Irwin Goodleaf dated October 24, 1974 with attached paper entitled "A Brief History fo the Clench Defalcation Case"

These materials have also been reviewed by the Department of Justice.

The Claim of the Chippewas of the Thames

In brief, the Chippewas of the Thames contend the following:

Issue 1 Clench was an agent for the Crown in his dealings with the Chippewas of the Thames and that Canada is liable for the defalcation by Clench.

Issue 2 The Crown had a fiduciary obligation, under the terms of the 1834 surrender, to prudently sell the land, collect the money and manage the proceeds.

Issue 3 The Chippewas of the Thames were deliberately deprived by the Crown's action of remedies that would have been available to other people in Canada in similar circumstances. The Crown used its control of band funds to prevent the Chippewas of the Thames from going to court.

Issue 4 The Crown took undue advantage of its position and derived an immoderate benefit from the 1906 settlement. Combined with issue 3 above, these actions are sufficient that a court would set aside the 1906 settlement.

Issue 5 The Crown conducted miscellaneous failures and breaches with respect to the handling of the Clench affair.

Summary

The preliminary position of Canada is that the Chippewas of the Thames claim regarding the Clench defalcation should be accepted for negotiation under the Specific Claims Policy. The Policy states that:

> A lawful obligation may arise in any of the following circumstances:
> (i) the non-fulfilment of a treaty or agreement between Indians and the Crown.
> (ii) a breach of an obligation arising out of government administration of Indian funds or other assets.

3

Moreover, the Government of Canada is prepared to acknowledge claims beyond a lawful obligation which are based on the following circumstances

> (ii) fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government in cases where the fraud can be clearly demonstrated

Canada's Preliminary Position

Issue 1 Clench was an agent for the Crown in his dealings with the Chippewas of the Thames and that Canada is liable for the defalcation by Clench

Canada's preliminary position is that Clench's conduct amounts to fraud in his managing of the land sales of the Caradoc reserve. The Specific Claims policy allows the negotiation of such claims under the "beyond lawful obligation" category.

Issue 2 The Crown had a fiduciary obligation, under the terms of the 1834 surrender, to prudently sell the land, collect the money and manage the proceeds

Our review of the Holmes report indicates that the Crown failed to fulfill the terms and conditions of the surrender of 1834. The terms were not fulfilled as a result of Clench's questionable administration of reserve land sales money. Although the Crown took some steps to recoup some of the missing funds by assuming some of Clench's mortgages and getting a *lis pendens* against one of his properties, it did not go far enough in trying to liquidate the assets and repay the money.

Issues 3 and 4 The Chippewas of the Thames were deliberately deprived by the Crown's action of remedies that would have been available to other people in Canada in similar circumstances. The Crown used its control of band funds to prevent the Chippewas of the Thames from going to court

The Crown took undue advantage of its position and derived an immoderate benefit from the 1906 settlement. Combined with item 3 above, these actions are sufficient that a court would set aside the 1906 settlement.

4

It is Canada's preliminary position that the 1906 release cannot be defended as fair and reasonable in the circumstances under which it was obtained from the Chippewas of the Thames First Nation. Canada will not rely on the 1906 release to avoid its lawful obligations except insofar as the settlement amount in the 1906 release will be considered an "offset" against the final settlement of this claim.

Issue 5 The Crown conducted miscellaneous failures and breaches with respect to the handling of the Clench affair.

In light of recognition by Canada of an outstanding lawful obligation, issue 5 has not been considered in any depth. To the extent that these might have been alternative arguments, they may no longer be relevant to the consideration of the claim. However, Canada is prepared to consider any further submissions the Chippewas of the Thames may wish to make on these points and give further consideration to any impact they may have on the claims acceptance.

Compensation

Should the Chippewas of the Thames First Nation agree to enter negotiations with Canada, settlement negotiation would be guided by compensation criteria 1 and 9 of the Specific Claims Policy. These criteria state that:

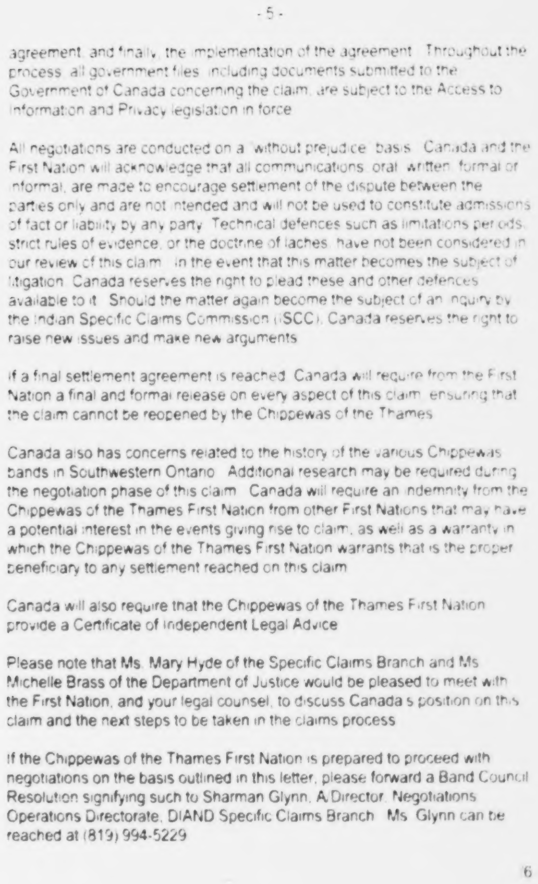
1 As a general rule, a claimant band shall be compensated for the loss it has incurred as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.

9 Any compensation paid in respect to a claim shall take into account any previous expenditures already paid to the claimant in respect to the same claim.

If any other criterion is found to be applicable, this will be raised in the negotiations.

Negotiations

The steps of the process for the negotiation of Specific Claims settlements are as follows: agreement on a joint negotiating protocol, development of a settlement agreement, conclusion of the agreement, ratification of the



- 5 -

agreement, and finally, the implementation of the agreement. Throughout the process, all government files, including documents submitted to the Government of Canada concerning the claim, are subject to the Access to Information and Privacy legislation in force.

All negotiations are conducted on a "without prejudice" basis. Canada and the First Nation will acknowledge that all communications, oral, written, formal or informal, are made to encourage settlement of the dispute between the parties only and are not intended and will not be used to constitute admissions of fact or liability by any party. Technical defences such as limitations periods, strict rules of evidence, or the doctrine of laches, have not been considered in our review of this claim. In the event that this matter becomes the subject of litigation, Canada reserves the right to plead these and other defences available to it. Should the matter again become the subject of an inquiry by the Indian Specific Claims Commission (ISCC), Canada reserves the right to raise new issues and make new arguments.

If a final settlement agreement is reached, Canada will require from the First Nation a final and formal release on every aspect of this claim, ensuring that the claim cannot be reopened by the Chippewas of the Thames.

Canada also has concerns related to the history of the various Chippewas bands in Southwestern Ontario. Additional research may be required during the negotiation phase of this claim. Canada will require an indemnity from the Chippewas of the Thames First Nation from other First Nations that may have a potential interest in the events giving rise to claim, as well as a warranty in which the Chippewas of the Thames First Nation warrants that is the proper beneficiary to any settlement reached on this claim.

Canada will also require that the Chippewas of the Thames First Nation provide a Certificate of Independent Legal Advice.

Please note that Ms. Mary Hyde of the Specific Claims Branch and Ms. Michelle Brass of the Department of Justice would be pleased to meet with the First Nation, and your legal counsel, to discuss Canada's position on this claim and the next steps to be taken in the claims process.

If the Chippewas of the Thames First Nation is prepared to proceed with negotiations on the basis outlined in this letter, please forward a Band Council Resolution signifying such to Sharman Glynn, A/Director, Negotiations Operations Directorate, DIAND Specific Claims Branch. Ms. Glynn can be reached at (819) 994-5229.

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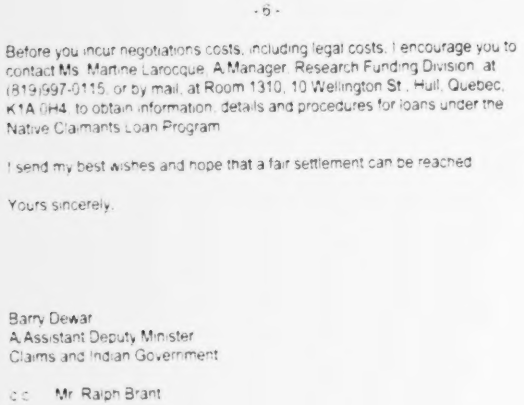

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Before you incur negotiations costs, including legal costs, I encourage you to contact Ms. Martine Larocque, A/Manager, Research Funding Division, at (819)997-0115, or by mail, at Room 1310, 10 Wellington St., Hull, Quebec, K1A 0H4, to obtain information, details and procedures for loans under the Native Claimants Loan Program.

I send my best wishes and hope that a fair settlement can be reached.

Yours sincerely,

Barry Dewar
A/Assistant Deputy Minister
Claims and Indian Government

c.c. Mr. Ralph Brant

INDIAN CLAIMS COMMISSION

MISTAWASIS FIRST NATION INQUIRY
1911, 1917, AND 1919 SURRENDERS

PANEL

Chief Commissioner Phil Fontaine
Commissioner Roger Augustine

COUNSEL

For the Mistawasis First Nation
Lesia Ostertag

For the Government of Canada
Jeffery A. Hutchinson

To the Indian Claims Commission
Kathleen N. Lickers

MARCH 2002

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PART I

INTRODUCTION

In October 1992, the Mistawasis First Nation[1] submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that three land surrenders taken of certain portions of the Mistawasis Indian Reserve (IR) 103, received after the First Nation signed Treaty 6, were null and void on various grounds. The claim, which was filed under the federal Specific Claims Policy, specifically contended that the Crown had breached its fiduciary obligations to the Band in obtaining the surrenders and that the surrenders were obtained as a result of undue influence, in unconscionable circumstances, and in violation of the terms of the *Indian Act*.

The claim was reviewed by the Department of Indian Affairs and Northern Development and the Department of Justice, in accordance with the Specific Claims process. On August 10, 1994, Jack Hughes, of Specific Claims West, informed the Chief and Council of the Mistawasis First Nation of the federal government's preliminary position regarding the claim. According to Mr Hughes's letter, the Government of Canada was prepared to accept part of the claim for negotiation, on the basis that the Crown apparently failed to administer and collect proceeds from the 1911 surrender and sale in a proper manner.[2] At the request of the solicitor for the Band, the Specific Claims Branch undertook further research and reviewed its preliminary position with respect to the 1917 and 1919 surrenders. As a result, Jack Hughes advised the Chief and Council, by letter dated October 4, 1994, that Canada was also prepared to accept portions of the claim relating to the two later surrenders, on essentially the same basis as that upon which they had agreed to negotiate the 1911 surrender.[3] A formal letter to this effect was sent to

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[1] Alternatively referred to as the "Mistawasis Band," the "First Nation," or the "Band," depending on the historical context.

[2] Jack Hughes, Specific Claims West, DIAND, to Chief Leona Daniels and Council, Mistawasis First Nation, August 10, 1994 (ICC file 2107-35-01, vol. 1).

[3] Jack Hughes, Specific Claims West, DIAND, to Chief Leona Daniels and Council, Mistawasis First Nation, October 4, 1994 (ICC file 2107-35-01, vol. 1).

Chief Daniels on November 3, 1994, by Assistant Deputy Minister John Sinclair.[4]

In the First Nation's view, this response did not sufficiently address its historical grievances. As a result, on August 29, 1996, its solicitor, Lesia Ostertag, wrote to the Indian Claims Commission (ICC) asking the Commission to review the rejected portions of its claim.[5] On September 9, 1996, Commission Counsel Ron Maurice wrote to the director general of the Specific Claims Branch and to the senior general counsel of DIAND Legal Services to inform them that the Commission had agreed to conduct an inquiry into the matter.[6] On September 20, the First Nation requested that the Commission put the inquiry into abeyance, pending the outcome of negotiations on the accepted portions of the claim. When those negotiations did not prove successful, the First Nation requested the ICC to proceed with the inquiry into the rejected portions of the claim, in May 1998.[7]

As part of the Commission's inquiry into this claim, a planning conference was held on January 5, 1999, at which the formulation of the issues in the claim was discussed extensively. A community session was also held at the reserve on June 15, 1999. At this time, Commission staff heard evidence from several of the community's elders.

Settlement discussions took place between the parties throughout the year 2000, and as a result the inquiry was again placed in abeyance. In the spring of 2001, the Commission was informed that the Mistawasis First Nation had ratified a Surrender Settlement Agreement with the Government of Canada.[8]

As a result of this process, the Commission suspended its inquiry into the claim and was not required to make any findings. This report is based on historical reports and documents submitted to the Commission by the Mistawasis First Nation and the Department of Indian Affairs and Northern Development. The balance of the record in this inquiry is referenced as Appendix A to this report.

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[4] John Sinclair, Assistant Deputy Minister, Claims and Indian Government, to Chief Leona Daniels, Mistawasis First Nation, November 3, 1994 (ICC file 2107-35-01, vol. 1).

[5] Lesia S. Ostertag, Counsel for the Mistawasis First Nation, to Indian Claims Commission, August 29, 1996 (ICC file 2107-35-01, vol. 1).

[6] Ron S. Maurice, Commission Counsel, ICC, to Michel Roy, Director General, Specific Claims Branch, et al., September 9, 1996 (ICC file 2701-35-01, vol. 1).

[7] Band Council Resolution, Mistawasis First Nation, May 13, 1998 (ICC file 2701-35-01).

[8] Kathleen Lickers, Commission Counsel, ICC, to Chief and Council, Mistawasis First Nation, April 11, 2001 (ICC file 2701-35-01, vol. 2).

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[9]

This Policy, outlined in the department's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[10] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

The policy also addresses the following types of claims, characterized as "Beyond Lawful Obligation":

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[11]

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[9] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[10] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in (1994) 1 ICCP 171–85 (hereafter *Outstanding Business*).

[11] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 171, 85.

The Commission has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

PART II

HISTORICAL BACKGROUND

EARLY HISTORY OF THE MISTAWASIS BAND

The Cree ancestors of the Mistawasis Band migrated to present-day Saskatchewan from the woodlands of eastern Manitoba and the Great Lakes area of Ontario in the 17th and 18th centuries. This migration was fuelled by the European fur trade, specifically by the establishment of fur trade posts on the western shores of Hudson Bay in the years following 1670.[12] Although the Cree did not completely relinquish their woodland culture, they developed a new means of subsistence on the Plains, which involved hunting the buffalo on horseback. They also developed a relationship of mutual dependence with the Hudson's Bay Company (HBC), the company that would eventually become the leading commercial concern in the inland trade. In the course of that relationship, the Cree became the dominant middlemen of the fur trade in western Canada, controlling European access to furs trapped by Indians in the more remote regions in the west, while making a profit on trade goods exchanged for furs. The Cree occupied that position until the depletion of furs in the lands draining into the Saskatchewan and Nelson Rivers impelled fur traders to establish trading posts further inland and to the north of Cree territory. As the fur trade began to focus on the Mackenzie and Athabasca river systems, aboriginal groups located further north, such as the Chipewyan, took over what had been the exclusive domain of the Cree. As a result, the latter became progressively more involved with the provisioning trade, hunting deer and buffalo for meat to supply the employees of the increasing number of inland trading posts.[13]

By the 1860s, the buffalo were disappearing from the eastern Plains, the homeland of the Cree. To find buffalo for their own subsistence, the Cree were forced to enter the territory of the Blackfoot, further west. Although the Cree and Blackfoot had been peaceful trading partners during the former nation's tenure as middleman in the fur trade, the depletion of their common food source increasingly led to violent conflict between them.[14] Together with the devastating effects of periodic epidemics, the battles over buffalo territory began to decimate aboriginal populations on the southern Plains. Both the Cree and the Blackfoot recognized the futility of continued warfare, and, in 1871, a peace agreement was concluded between them. By this treaty, the Cree retained access to the buffalo in the Cypress Hills, the only place on the southern Plains where the buffalo were still to be found on a consistent basis.[15]

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[12] John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988), 5.

[13] John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988), 19-20.

This, however, was a short-term solution to the problem of survival. The depletion of the buffalo signalled the beginning of the end of an era. The transfer of the vast HBC territories to Canada in 1870, and the prospect of agricultural settlement moving into the lands occupied by the Cree and other nations, was its death knell. The stage was set for the coming of the treaties and the beginning of a settled way of life for the Cree of the Plains.

BACKGROUND TO TREATY 6

In 1871, several Plains Cree Chiefs, having heard of the transfer of Rupert's Land to the Dominion of Canada, contacted the Lieutenant Governor of the North-West Territories, Adams G. Archibald, to petition the government to enter into a treaty with them. They referred to the destitution of their people, caused by disease and the disappearance of the buffalo, and requested cattle, tools, and implements from the Canadian government in order to enable them to adjust to the new realities of life.[16] The chief factor of the Hudson's Bay Company, who had transcribed and forwarded the petition, advised the Lieutenant Governor in the strongest terms that a treaty with the Cree of Saskatchewan was necessary to preserve the peace. Despite this, however, the treaty process in Saskatchewan was delayed for several years.

The Council of the North-West Territories, a representative body exercising certain executive and legislative powers in the lands newly acquired by

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[14] Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 93–94.

[15] John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988), 117–18.

[16] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on which They Were Based* (Toronto: Belfords, Clark & Co., 1880), 170–71 (ICC Exhibit 5, tab D).

Canada, had recommended in 1873 that treaties be made with the Indians located between the boundaries of the existing treaties (Treaties 1, 2, and 3), and Fort Carlton, an area that would have included the territory of Chief Mistawasis and his followers. Notwithstanding this recommendation, however, Treaty 4, signed in 1874, included only the Cree and the Saulteaux of the southern Plains.

The uncertain future of those Indian nations remaining outside treaty contributed to a state of unease among them.[17] The Cree were aware of the promises made to the Indian nations living within the borders of the United States, promises that had subsequently been broken in the furtherance of the American government's expansionist settlement policies. To pressure the dominion government to address their concerns by means of a treaty, Cree leaders took steps to prevent the use of their traditional lands.[18] According to one source, Chief Mistawasis took an active role in this strategy. In 1875, he apparently ordered his men to stop the construction of a telegraph line within Cree territory and to turn back a survey party from the Geological Survey of Canada, which had been working in the area.[19]

By such means, the attention of the dominion government was engaged. Lieutenant Governor Alexander Morris, Archibald's successor, received permission from Interior Minister David Mills to send an emissary to the Cree living near Fort Carlton to inform them that Commissioners would be sent the following summer to negotiate a treaty with them. According to the envoy selected, the Reverend George McDougall, the news allayed much of the Crees' discontent. He informed Morris that Mistawasis, whom he described as the "head Chief of the Carlton Indians," expressed great satisfaction at the news of the forthcoming negotiations.[20] The process that would lead to the conclusion of Treaty 6 was under way.

THE NEGOTIATION OF TREATY 6

The dominion government appointed three Commissioners to negotiate a treaty with the Indians at Forts Carlton and Pitt – Lieutenant Governor Morris, the Honourable James McKay, and HBC Chief Factor W.J. Christie. They proceeded from Winnipeg in the summer of 1876, arriving at Fort Carlton on August 15. On that evening, the two most senior and respected Chiefs of the district, Mistawasis and Ahtakakup, came to the fort to pay their respects to Morris. The start of negotiations was delayed, however, as the assembled Indians wished to confer among themselves.[21]

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[17] Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 102.

[18] John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 213–14.

[19] Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 7.

[20] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke & Co., 1880), 173–75 (ICC Exhibit 5, tab D).

At this meeting of the assembled Cree negotiators, Mistawasis spoke strongly in favour of the treaty. Referring to the disappearance of the buffalo, the ravages of smallpox, and his desire that the North-West Mounted Police (NWMP) protect his people against the importation of alcohol, Mistawasis stated:

> I speak directly to Poundmaker and The Badger and those others who object to signing this treaty. Have you anything better to offer our people? ... I for one think that the Great White Queen Mother has offered us a way of life when the buffalo are no more. Gone they will be before many snows have come to cover our heads or graves if such should be.[22]

Chief Ahtakakup expressed similar views, arguing that the inevitability of white settlement made the treaty – "the acceptance of the Queen's hand" – the only sensible course of action.[23]

Negotiations began on August 18, 1876, following a sacred pipe ceremony. Morris's speech was translated by a Métis interpreter named Peter Erasmus, who had been chosen by the Chiefs. The secretary to the Treaty Commission, Dr A.G. Jackes, took detailed notes of that first meeting and at all subsequent meetings, specifically recording the commentary and speeches of the various parties.[24] Dr Jackes's notes, along with Morris's own report of the negotiations, make it clear that all parties were concerned that the treaty facilitate farming, given the dramatic depletion in the buffalo herds that provided the economic livelihood of the Plains Indian. Morris wrote:

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[21] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke & Co., 1880), 181–82 (ICC Exhibit 5, tab D).

[22] Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 131.

[23] Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 132.

[24] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke & Co., 1880), 197–244 (ICC Exhibit 5, tab D). Commissioner Morris included this record with the treaty document when he transmitted it to the Department of Indian Affairs and noted that "it will be of great value to those who will be called on to administer the treaty, showing as it does what was said by the negotiators and by the Indians, and preventing misrepresentations in the future."

> I ... fully explained to them the proposals I had to make, that we did not wish to interfere with their present mode of living, but would assign them Reserves and assist them as was being done elsewhere, in commencing to farm, and that what was done would hold good for those that were away.[25]

In addition to the setting aside of reserves, Morris specifically mentioned the provision of schools, the prohibition of alcohol, the provision of agricultural implements, tools, cattle, and seed, and the provision of annuities.[26] At the end of Morris's speech, Chief Mistawasis arose, thanked him, and advised that the Chiefs of the assembled bands required some time to consider what he had said and that they would meet him again a few days later.

The second meeting took place on August 22, 1876. From representations made by several of the Chiefs, it was immediately obvious that the Indians' main concern was the issue of support or assistance from the government once they had settled on reserves. Morris apparently viewed these concerns as excessive requests for aid. In response, he emphasized agriculture as the way the Indians could support themselves, telling them that

> we could not assume the charge of their every-day life, but in a time of great national calamity they could trust to the generosity of the Queen.[27]

To this, Chief Mistawasis replied that he had not meant to ask for food every day, but only when his people commenced to farm and in case of famine. What was contemplated, Chief Ahtakakup added, was food in the spring, when they were planting instead of hunting, and proportionate help as they advanced in their new way of life.[28] The meeting then adjourned, at the Chiefs' request, so they could consult among themselves.

On August 23, the parties returned to the negotiations. At the outset, the Chiefs' interpreter read aloud a list of requests from the Chiefs, which included greater quantities of tools, implements, and cattle, as well as horses, wagons, medicines, assistance for the sick and destitute, the right to cut timber on Crown lands, and other benefits. After consulting with the other Commissioners, Morris agreed to make some concessions, such as food provisions for three years after each Band commenced farming and an increased number of farming implements and farm animals.[29] The assembled Chiefs then indicated their acceptance, and Treaty 6 was signed that day, with Mistawasis and Ahtakakup signing as head Chiefs.

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[25] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clark & Co., 1880), 184.

[26] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clark & Co., 1880), 208–09.

[27] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880), 188.

[28] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880), 213.

In his official report, Morris wrote that he was encouraged by the Indians' interest in taking up agriculture, that it was important for Canada to comply with the terms of treaty promptly to further this interest, and that "advantage should be taken of this disposition to teach them to become self-supporting, which can best be accomplished [with] the aid of a few practical farmers and carpenters to instruct them in farming and house building."[30]

The terms regarding agriculture agreed to between Morris and the Chiefs were incorporated into the written treaty itself. The relevant provisions state:

> Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands ... and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families...
>
> ...
>
> It is further agreed between Her Majesty and the said Indians, that *the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land*, that is to say: – Four hoes for every family actually cultivating, also two spades per family as aforesaid; one plough for every three families as aforesaid, one harrow for every three families as aforesaid; two scythes, and one whetstone and two hayforks and two reaping-hooks for every family as aforesaid; and also two axes, and also one cross-cut saw, and also one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each band; and also for each Chief, for the use of his band, one chest of ordinary carpenter's tools; also for each band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band, four oxen, one bull and six cows, also one boar and two sows, and one handmill when any band shall raise sufficient grain therefor; *all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians*. ...
>
> ...
>
> That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by her Indian Agent or Agents, will grant to the Indians assistance of

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[29] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880), 215-17.

[30] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880), 194.

> such character and to such extent as her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them;
>
> That during the next three years, after two or more of the reserves hereby agreed to be set apart to the Indians, shall have been agreed upon and surveyed, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars to be expended for them by Her Majesty's Indian Agents, in the purchase of *provisions for the use of such of the band as are actually settled on the reserves and are engaged in cultivating the soil, to assist them in such cultivation.*
>
> That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion thereto (exclusively, however, of the Indians of the Carlton Region), there shall, during three years, after two or more reserves shall have been agreed upon and surveyed, *be distributed each spring among the bands cultivating the soil on such Reserves*, by Her Majesty's Chief Indian Agent for this treaty in his discretion, a sum not exceeding one thousand dollars, in the purchase of *provisions for the use of such members of the band as are actually settled on the reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation.*[51]

While negotiating the treaty, Morris encouraged prompt adherence and selection of lands. He alluded to the danger that settlers might claim good land if it were not first selected for Indian settlement. He also assured the Indians that, once land had been reserved for them, it could not be taken away without their consent.

> [U]nless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be ... [W]e wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you.
>
> ... [U]nderstand *me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes.*[52]

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[51] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880), 351, 365. Italic emphasis added.

[52] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880), 204-05. Emphasis added.

Morris also assured the Indians that "when you go to your reserves you will be followed by the watchful eye and sympathetic hand of the Queen's Councillors."[53]

MISTAWASIS INDIAN RESERVE 103

Chief Mistawasis was among the first of the Cree leaders to ask that his reserve be set aside.[54] He chose a location at the Band's traditional wintering grounds, after consultation with the Reverend John Hines, a missionary he respected.[55] In 1878, Surveyor Edgar Bray surveyed a reserve of 77 square miles, or 49,280, acres for Chief Mistawasis and his Band of 53 families. The reserve was located at Snake Plains, 20 miles northwest of Fort Carlton. The reserve is described in Nelson's Book of Surveys:

> The north-western part of this reserve is well wooded with poplar, jack-pine, spruce, birch, and tamarac. The south-eastern part is a bushy prairie interspersed with bluffs of poplar and willow. There are numerous swamps affording hay of excellent quality. In the flats the sub-soil is a rich loam covered by a considerable thickness of vegetable mould, and on the high grounds the soil is generally sandy. The reserve is well watered and the pasture magnificent.[56]

The reserve was formally set aside on May 17, 1889, by Order in Council PC 1151.[57]

BACKGROUND TO THE SURRENDERS

The followers of Chief Mistawasis were part of a group of Cree often referred to as the "House People," because they had acquired the custom of living in dwellings.[58] Having close ties to the missionaries and the Hudson's Bay Company, they had begun to grow crops prior to the signing of Treaty 6,[59] and, by 1878, had over 20 acres under cultivation.[60] They were hampered, however, by the poor quality of the implements provided to them pursuant to the treaty. This circumstance, coupled with the general slowness with which the government forwarded the promised supplies, caused discontent and motivated Chief Mistawasis to advocate for the rights of his people in the years after the treaty was signed.[41]

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[53] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880), 212.

[54] Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 29.

[55] John L. Tobias, "History of Mistawasis Band, 1870-1925," unpublished manuscript on file at Federation of Saskatchewan Indian Nations [FSIN], n.d., 9.

[56] Nelson's Book of Surveys, Order in Council PC 1151, May 17, 1889 (ICC Documents, p. 5).

[57] Nelson's Book of Surveys, Order in Council PC 1151, May 17, 1889 (ICC Documents, p. 5).

[58] Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 12.

[59] John L. Tobias, "History of Mistawasis Band, 1870-1925," unpublished manuscript on file at FSIN, n.d., 1.

[60] Sarah Carter, *Lost Harvests* (Montreal: McGill-Queen's University Press, 1990), 71.

The situation was exacerbated by the total disappearance of the buffalo in 1879. At that time, only the provision of emergency rations from the NWMP, and from the government pursuant to the "famine" clause of Treaty 6, kept many of the Plains nations from starving.[42]

The privations suffered by many of the bands of the Plains and the fear that discontent would turn into violence prompted the government to establish a farm instruction program in 1879. Notwithstanding this new form of assistance, Chief Mistawasis continued to press the newly appointed Indian Commissioner, Edgar Dewdney, for adequate supplies of implements and provisions, stressing that the Band's previous appeals had been ignored.[43] As well, when the Governor General, Lord Lorne, passed through Battleford on his 1881 tour of western Canada, Mistawasis and other Treaty 6 Chiefs made representations to him, advising him that the terms of the treaty had not been fulfilled in this respect.[44] The Governor General agreed to pass on the Chiefs' concerns to government officials in Ottawa; however, these were largely ignored, and any moves towards self-sufficiency came as a result of the Band's own efforts.[45]

A severe drought in 1884 affected all the bands' ability to feed themselves and contributed to the general discontent among the Plains nations. This discontent fuelled support for the political aims of Louis Riel and his Métis followers. Notwithstanding their grievances, however, Chief Mistawasis and his Band remained loyal to the Crown during the North-West insurrection of 1885, paying for their loyalty through the loss of many of their homes, which were looted and destroyed in the course of the rebellion.[46]

After the uprising had been quelled, the Mistawasis Band returned to its reserve to farm. Before long, however, policy changes within the Department of Indian Affairs were to have detrimental effects on their efforts.

In 1889, Indian Commissioner Hayter Reed adopted an agricultural policy by which

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[41] John L. Tobias, "History of Mistawasis Band 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 10.

[42] John L. Tobias, "History of Mistawasis Band 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 12–13.

[43] Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 57.

[44] Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 42.

[45] John L. Tobias, "History of Mistawasis Band 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 14.

[46] Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 82.

> Indian farmers were to emulate "peasants of various countries", who kept their operations small and their implements rudimentary.[47]

The Commission first examined this policy in the 1907 Reserve Land Surrender Inquiry of the Kahkewistahaw First Nation. There the Commission noted:

> Under the severalty policy, reserves were to be surveyed and subdivided into 40-acre plots for distribution to individual band members, on the rationale that this would allow the best lands to be divided more equitably. By the same token, however, it also led to large tracts of "unused" reserve lands that could then be sold, a goal which local settlers and newspapers endorsed and which Reed envisaged as the logical outcome of the policy.
>
> The related peasant farming policy reflected the notion that an Indian farming family should possess only the amount of land it could cultivate using the most primitive of hand tools, most of which were to be manufactured by the family itself. The official goal was to free Indians from "communistic" tribal culture by converting them into European peasant-style subsistence farmers.[48]

Sophisticated, labour-saving machinery was banned, a policy that caused the Mistawasis Band to lose a portion of its crop in 1891.[49] Asserting that the new policy was a violation of the terms of Treaty 6, Chief Mistawasis appealed to departmental officials to permit the use of modern implements, but his pleas were ignored.[50] Thereafter, the Band's agricultural activities went into decline, particularly after the Chief, long an advocate of farming, grew old.

After the turn of the century, only a few members of the Band continued to farm, even though the peasant farming policy had been discontinued in 1897. There was still some interest in stock-raising and farming, however, as indicated by a March 19, 1906, meeting between the Band and the Agent to discuss fencing the Band's lands.[51] It was agreed that in order to pay for the proposed fencing, band members would be taxed at a rate of one dollar per head for all stock owned by them. Band members not owning animals would be charged one dollar per person. It is not known if the 1906 fencing plan came to pass, but, ironically, fencing would be the issue that would precipitate the first surrender of the Band's lands.

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[47] Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889–1897," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 353–77.

[48] ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry Report* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 51–52.

[49] John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 20.

[50] John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 21.

[51] John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 22–23.

The first decade of the 20th century was characterized by a government policy that often put the interests of immigrant agricultural settlers ahead of the needs of Indian bands. This was especially true during the tenure of Frank Oliver as Minister of the Interior, during the years 1905–11. During his term of office, agricultural immigration was not only encouraged by the dominion lands policy but also facilitated by amendments to the *Indian Act* designed to make the surrender of reserve land more attractive to Indian bands. The surrendered land would then be opened for settlement, often through the medium of land speculators, who made a profit on its resale.

The Carlton district, home to the Mistawasis Band as well as to other First Nations, was not immune to the influx of settlers during this period in history. As homesteads were taken up, the department began to field inquiries from outside parties regarding the future availability of reserve land for homesteading purposes.[52] At one point, surrender of the nearby Muskeg Lake Reserve, and the amalgamation of that Band with the Mistawasis Band, was discussed.[53] Nothing came of this suggestion, however; before long, the Mistawasis reserve itself would be the subject of surrender discussions.

1911 SURRENDER

By 1910, some band members were expressing a renewed interest in farming on the reserve. The progress of settlement around the reserve hampered these plans, however, as animals from neighbouring homesteads would trespass on the Band's land. Therefore, during the winter of 1910, the Band asked the local MP, Mr Ruttan, to help them secure funds to fence the reserve. The Indians were willing to provide the posts but wanted the department to purchase the wire fencing. The estimated cost of the wire to fence the 38-mile perimeter of the reserve was $1,500, an amount that excluded the cost for posts and labour.[54] The department informed Indian Agent Thomas Borthwick that funds were unavailable and suggested that the Indians use their annuities to purchase wire.[55] Borthwick responded that the Indians would not agree to this suggestion, but preferred to surrender 118 acres on the extreme southeast corner of the reserve, which was cut off from the main portion of the reserve by the Canadian Northern Railway's right of way. The Band proposed to use these funds to cover the necessary costs. Borthwick also informed the department that the Indians wanted to purchase farm machinery with the money obtained from the surrender.[56]

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[52] John L. Tobias, "History of Mistawasis Band 1870–1928" (unpublished manuscript on file at FSIN, n.d.), 22–23.

[53] W.A. Orr to Deputy Minister, November 26, 1907, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 26).

[54] D.C. Scott, Chief Accountant, Department of Indian Affairs, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, January 27, 1911, DIAND file 672/30-13-103, vol. 1 (ICC Documents, pp. 34–35).

The department felt that the sale of such a small piece of land would not be sufficient to pay for the fencing and the farm machinery. It proposed instead that the Band surrender a larger block, comprising 1,607 acres on both sides of the right of way located at the southeast corner of the reserve.[57] Surveyor Lestock Reid had described part of this area several years earlier as being "very choice, prairie with poplar bluffs and admirably suited for agriculture."[58]

On January 31, 1911, the department instructed Indian Agent Borthwick to submit a surrender to the Band for the southeast corner of the reserve. On February 22, 1911, Borthwick returned the signed surrender to the department. He advised that the Indians had insisted on an upset price of $15 per acre, and that they had inserted a clause in the surrender stating that the department should pay 50 per cent of the proceeds to band members.[59]

On February 28, 1911, Assistant Deputy and Secretary J.D. McLean returned the surrender to Borthwick. He advised that the two clauses regarding the $15 upset price and the payment to band members of 50 per cent of proceeds from sales were unacceptable, since it was believed that a price that high would effectively render part of the land unsaleable. McLean requested that Indian Agent Borthwick have the surrender amended and, if the Indians consented, an upset price could be fixed on each quarter section later. Borthwick was also instructed to tell the Indians that the distribution of money from sales would hinder any effort to accumulate interest to help pay for the repair and maintenance of farm machinery. As a result, the Indians were to be advised that, if the clause regarding the payment of proceeds was not removed, the entire plan would have to be abandoned.[60]

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[55] D.C. Scott, Chief Accountant, Department of Indian Affairs, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, January 27, 1911 (DIAND file 677/30-13-103, vol. 1) (ICC Documents, pp. 54-55).

[56] Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas A. Borthwick, Indian Agent, January 31, 1911 (DIAND file 677/30-13-103, vol. 1) (ICC Documents, pp. 56-57).

[57] Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas A. Borthwick, Indian Agent, January 31, 1911 (DIAND file 677/30-13-103, vol. 1) (ICC Documents, pp. 56-57).

[58] Lestock Reid, surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, January 2, 1908, National Archives of Canada (hereafter NA), RG 10, vol. 3075, file 10176 (ICC Documents, p. 27).

[59] Thomas A. Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, February 22, 1911 (DIAND file 677/30-13-103, vol. 1) (ICC Documents, pp. 39-40).

The Band apparently agreed to the new terms, but added a provision that horses be purchased out of the sale proceeds.

On March 20, 1911, Chief Jacob Johnstone and 22 other band members signed the surrender, along with Agent Borthwick and the interpreter, William Dreaver.[61] The surrender stipulated that the department would sell the 1,607 acres and use the funds to fence the reserve, to purchase three specified pieces of farm machinery, and to maintain the machinery for the first year of operation. It was agreed that the department would advance funds to pay for the contemplated expenditures, which would be charged against the future proceeds of sales. The department would credit the balance to the Band, and the accrued interest would pay for future maintenance of the fence and farm machinery.[62] In addition, half the balance would be utilized to buy horses and machinery "as required by the Band."

On the same day, the affidavit attesting to the circumstances surrounding the surrender was sworn by the Chief and three headmen, the agent, and the interpreter before a justice of the peace.[63] An Order in Council dated April 20, 1911, accepted the surrender.[64]

The surrendered land was sold by public auction on August 2, 1911, for an average price of almost $18 per acre. The terms of the sale were one-tenth cash down, with the balance to be paid in nine equal instalments, with 5 per cent interest on the unpaid balance. The purchasers, real estate agents P.D. Tyerman and W.R. McLeod, paid only the first two instalments, plus some interest on the balance, but did not make any other instalment payments. By 1928, the purchasers owed over $42,000 in principal and interest. The department then cancelled most of the sales, and the land was resold to new purchasers, often for less than the 1911 price.[65]

On April 30, 1915, by Order in Council, the Department of Indian Affairs granted a right of way for a road allowance to the Province of Saskatchewan.

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[60] J.D. McLean, Assistant Deputy & Secretary, Department of Indian Affairs, to Indian Agent Thomas Borthwick, February 28, 1911, DIAND file 672/30-13-105, vol. 1 (ICC Documents, pp. 41-42).

[61] Surrender document signed on March 20, 1911, DIAND Land Registry, Instrument No. [illegible] (ICC Documents, pp. 45-48).

[62] Surrender document signed on March 20, 1911, DIAND Land Registry, Instrument No. [illegible] (ICC Documents, pp. 45-48).

[63] Affidavit, March 20, 1911, NA, RG 2, vol. 1167 (ICC Documents, p. 49).

[64] Order in Council PC 795, April 20, 1911 (ICC Documents, p. 51).

[65] Submission to the Minister of Indian and Northern Affairs on the Mistawasis Surrender Claims, October 26, 1992 (ICC Documents, pp. 759-760).

over 17.1 acres within the surrendered land.[66] The province paid for the right of way based on the average price realized from the other land sales within the surrendered block. Another Order in Council, dated May 17, 1916, transferred the road allowances surrounding each section within the surrendered block to the province, without reference to any additional compensation.[67]

A SECOND SURRENDER

The question of a second surrender arose before the details of the first surrender were settled. Shortly after the August 2, 1911, auction, the Mistawasis Band approached Agent Borthwick with various requests. One was that half of the proceeds of the 1911 sale be divided and placed at the disposal of each individual band member. This request had been rejected by departmental officials prior to the original surrender earlier that year. Borthwick wrote to his superiors that he could not recommend carrying out the request, as it would encroach on the rights of future generations of band members, but that

> it is very desirable that the Indians be encouraged to a further sale of land to the extent of the balance of the surveyed southern portion of the reserve before the fencing is carried out.[68]

On September 7, 1911, Borthwick reported to J.D. McLean that he had been present at a meeting of the Mistawasis Band on September 4, at which the Indians decided to sell the remainder of the surveyed strip across the south portion of the reserve.[69] The Band proposed that all the proceeds of the sale of surrendered land be left in the Band's capital account, provided that the funds from the 1911 surrender were placed at their disposal. In response, Frank Pedley, the Deputy Superintendent General, instructed Agent Borthwick to present a surrender of 5,066 acres of land to the Band on slightly different terms.[70] The new surrender allowed the proceeds of sale from the first surrender to be used by the Band, so long as the expenditures did not exceed 50 per cent of the proceeds of all the land sales, less the fencing costs.

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[66] Order in Council PC 955, April 30, 1915 (ICC Documents, p. 125).

[67] Order in Council PC 1176, May 17, 1916 (ICC Documents, p. 176).

[68] Thomas Borthwick to J.D. McLean, August 12, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 67-69).

[69] Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, September 7, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 72-73).

[70] Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Indian Agent Thomas Borthwick, September 25, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 74-78).

The Band rejected these terms. Agent Borthwick reported on November 3, 1911, that the Indians would surrender only on the terms set out in Borthwick's letter of September 7.[71] The department responded with a slightly altered proposal, which would allow the Indians to utilize all the funds of the first sale, less the cost of the fencing, to purchase horses and machinery. The purchases could not exceed 50 per cent of the total sales to date less the cost of fencing.[72]

Apparently, the Band was willing to consent to this arrangement, provided that the proceeds of the first sale were made available to them immediately.[73] McLean, however, wrote back in January 1912 that no advances could be made until the amount of sale proceeds was ascertained.[74]

On February 7, 1912, Agent Borthwick wrote to J.D. McLean advising that the Indians wished to know the department's decision concerning their understanding of the terms of the proposed surrender:

> The understanding of the Indians was that each could only claim a share of the proceeds in proportion to the number of members in his family, and also that each one was personally responsible for the value of the horses placed in his hands last summer, and would make a payment upon them from his above specified share.

There was apparently no response from the department to the above. As a result, the Band held a meeting on September 27, 1912, and passed a resolution requesting the department to report on the progress of the proposed surrender. The band members apparently still understood that if they sold the land, they would receive 50 per cent of the proceeds on a per capita basis.[76]

In 1912, as part of the 1911 surrender agreement, the department fenced the Mistawasis IR 103 at a cost of $5,546.50 and purchased horses and harnesses for $5,487.27.[77] Departmental officials apparently decided not to charge the Band for the machinery. The department allowed the Band the use of its tractor engine and gang plough on a pay-per-use basis. This equipment could be used on other reserves on payment of a fee.[78]

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[71] Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, November 3, 1911, DIAND file 672/30-13-103, vol. 1 (ICC Documents, pp. 80-81).

[72] J.D. McLean, Secretary, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, November 17, 1911, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 82).

[73] Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, December 21, 1911, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 83).

[74] J.D. McLean, Secretary, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, January 8, 1912, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 88).

[75] Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, February 7, 1912, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 92).

[76] Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, October 8, 1912, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 113).

The above correspondence caused departmental officials to turn their minds again to the proposed second surrender. On November 11, 1912, Pedley sent a memorandum to the Lands and Accounts Branch asking for a report as to whether the surrender was still advisable or necessary.[79] The department asked W.J. Chisholm, Inspector of Indian Agencies, to produce the necessary report.[80] The report was evidently incomplete, since McLean wrote on February 18, 1913:

> The report can hardly be called a full one because you failed to deal with the present financial and industrial position of these Indians and do not touch upon the effect which the surrender would have upon them and their affairs.[81]

Chisholm submitted a second report on May 14, 1913, stating that he could not see any reason why further land should be surrendered. He noted that the Band had been equipped several times and that

> experience goes to show that if a portion of their land were now sold in order to renew their farming equipment, a few years hence they would be applying for the sale of a further portion for the same purpose.[82]

Chisholm also mentioned that the debts owed by some individuals in the Band were considerable, but he would not recommend using capital funds to pay for these debts, as it would be unjust to those members who had not been advanced funds to purchase horses.[83] McLean responded on June 4, 1913, and agreed with Chisholm that a surrender was not necessary.[84]

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[77] W.J. Chisholm, Inspector of Indian Agencies, to J.D. McLean, Secretary, Department of Indian Affairs, February 10, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 117-18).

[78] J.D. McLean, Assistant Deputy & Secretary, Department of Indian Affairs, to Jas. McKay, MP, Prince Albert, August 14, 1912, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 110).

[79] Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Lands and Accountant's Branches, November 11, 1912, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 114).

[80] W.J. Chisholm, Inspector of Indian Agencies, to J.D. McLean, Secretary, Department of Indian Affairs, February 10, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 117-18).

[81] J.D. McLean, Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, February 18, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 119).

[82] W.J. Chisholm, Inspector of Indian Agencies, to J.D. McLean, Secretary, Department of Indian Affairs, May 14, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 126-28).

For the next two years the Band continued to incur debt for farming expenses and, by 1915, it owed the department $5,526.67.[85] This situation was largely due to the fact that, as noted above, W.R. McLeod and P.D. Tyerman, who had purchased the lands surrendered in 1911, had not paid any instalments after 1912. In his 1915 annual report to the department, Chisholm wrote that the Carlton Agency Indians had

> become discouraged, owing to the burden of debts, which they had no prospect of removing. Latterly these have in some of the more serious cases been charged against the funds of the band under certain conditions.[86]

By January 1917, McLeod and Tyerman owed the department $14,644.05. In an attempt to collect the moneys owed, J.D. McLean instructed W.B. Crombie, Inspector of Indian Agencies, to tell McLeod and Tyerman

> that it is absolutely essential in order that good faith may be kept with the Indians, who are entitled to have the interest paid on the purchase price received by the Department and distributed, that the arrears be promptly paid.[87]

Crombie wrote back on March 14, 1917, advising that even if the land were repossessed, the department would probably not receive a better price on a resale than had been received in 1911.[88] He also advised that, if McLeod and Tyerman had better luck in the forthcoming year with their crop, there was no reason why they would not be able to make a substantial payment on their overdue account. As a result, he recommended that they be given an extension of time, to January 1918, to repay their debt.

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[83] Chisholm had reported on April 29, 1913, that the Indians owed a total of $9,811.74 for the purchase and repair of farming equipment. See W.J. Chisholm, Inspector of Indian Agencies, Individual Liability Statement, April 29, 1913, DIAND file 672/30-13-103, vol. 1 (ICC Documents, pp. 128-29).

[84] J.D. McLean, Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, June 4, 1913, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 129).

[85] J.D. McLean, Secretary, Department of Indian Affairs, to S.A. Milligan, Indian Agent, March 8, 1915, DIAND file 672/30-13-103, vol. 1 (ICC Documents, pp. 158-60).

[86] Department of Indian Affairs, *Annual Report for the year ended March 31, 1915*, p. 71 (ICC Documents, p. 175).

[87] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.B. Crombie, Inspector of Indian Agencies, January 9, 1917, NA, RG 10, vol. 6655, file 107A-5-5, part 1 (ICC Documents, pp. 186-87).

[88] W.B. Crombie, Inspector of Indian Agencies, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 14, 1917, NA, RG 10, vol. 6655, file 107A-5-5, part 1 (ICC Documents, pp. 189-90).

1917 Surrender

In February 1917, the issue of a second surrender was resurrected when Indian Agent S.A. Milligan informed the department that the Band was willing to surrender 5,000 acres:

> The Mistawasis Indians are also prepared to sell the 5000 acres outside of the reserve fence, at any time the Department think it advisable to do so.
> If suitable prices can be obtained, I would recommend that this request be granted as they all have more land than they will ever be in a position to use.[89]

Therefore, on April 10, 1917, McLean instructed Agent Milligan to submit to the Band a surrender of 5,028 acres of land along the southern boundary of the reserve, plus all adjacent road allowances. The Band signed the surrender on May 21, 1917. It stated:

> This surrender is made on the understanding that the land be sold at not less than Ten Dollars ($10.00) per acre.
>
> That half of the proceeds of the sale shall be funded and the balance, as well as the interest be divided among the members of the band, annually in cash.[90]

The surrender was forwarded to the department on May 25, 1917. Agent Milligan reported that the Band had insisted that the clauses concerning the upset price and the disposition of proceeds be added.[91]

On June 5, 1917, McLean wrote to Agent Milligan expressing his dissatisfaction with the manner in which the surrender had been taken. McLean criticized Milligan for ignoring the surrender instructions and advised that the surrender report lacked a voters' list, as well as information concerning the number of voters present and the number voting in favour of or against the surrender. Additionally, the surrender was not dated, and the affidavit had not been properly executed. McLean returned the documents, with new affidavits, to Milligan, and instructed him to correct them.[92]

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[89] S.A. Milligan, Indian Agent, to the Department of Indian Affairs, February 27, 1917, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 188).

[90] Surrender document dated May 21, 1917, DIAND Land Registry, Instrument No. BR X17173 (ICC Documents, pp. 201-05).

[91] S.A. Milligan, Indian Agent, to the Secretary, Department of Indian Affairs, May 25, 1917, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 207).

[92] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to S.A. Milligan, Indian Agent, Department of Indian Affairs, June 5, 1917 (ICC Documents, pp. 208-09).

On June 15, 1917, Agent Milligan returned the corrected surrender and the other documents to the department. The surrender was approved by Order in Council PC 1839, on June 30, 1917.[93]

1919 SURRENDERS

By mid-July 1917, departmental officials had begun to recommend that the land surrendered a month before be made available to the Soldier Settlement Board.[94] This board had been established pursuant to a government policy intended to benefit soldiers returning from World War I. The policy contemplated the provision of good agricultural land from the dominion government's supply, plus other benefits, to assist the returning soldier to make a start in farming. After the war ended in 1918, the demand for good farming land for the program increased dramatically. Most of the good land in western Canada had already been taken up, however, because of the influx of immigrant agricultural settlers and others since 1896. As a result, Indian reserves became a target of the program, and to facilitate their acquisition, the dominion government passed legislation in 1918 permitting the Soldier Settlement Board to purchase surrendered Indian lands. It was therefore not surprising that the recently surrendered portion of Mistawasis IR 103 should have come to the attention of government officials advocating for the soldier settlement scheme.

For two years following the 1917 surrender, no steps were taken to deal with the land. In April 1919, the Band requested information regarding the status of the lands surrendered in 1917, as well as a report on proceeds collected from the 1911 surrender and sales.[95] On April 23, 1919, the department informed Indian Agent S.A. Rowland that, once an agreement had been made with the Soldier Settlement Board, the department intended to transfer any unsold surrendered lands to the board.[96]

On May 10, 1919, Commissioner W.M. Graham reported that he was preparing for a joint inspection of the Mistawasis reserve with Walter Govan, a representative of the Soldier Settlement Board. Graham requested a copy of the 1917 surrender from departmental headquarters, so he would be aware of the terms of the surrender before his visit to the reserve.[97] J.D. McLean advised Graham on May 14, 1919, that the surrender contemplated an upset price of $10 per acre.[98]

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[93] Order in Council PC 1839 and Surrender (ICC Documents, p. 215).

[94] W.B. Crombie, Inspector of Indian Agencies, to D.C. Scott, DSGIA, July 13, 1917, DIAND file 672/30-13-103, vol. 1 (ICC Documents, pp. 218-19).

[95] S.A. Rowland, Indian Agent, to J.D. McLean, Department of Indian Affairs, April 8, 1919, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 354).

[96] W.A. Orr, In Charge, Lands and Timber Branch, to S.A. Rowland, Indian Agent, April 23, 1919, DIAND file 672/30-13-103, vol. 1 (ICC Documents, p. 357).

Graham visited the Mistawasis reserve in late June. He immediately sent a telegram to Deputy Superintendent General Duncan Campbell Scott advising that he had valued the land surrendered in 1917 at $12 an acre and that he had a "promise from [the] Mistawasis Indians for [an]additional surrender of eleven thousand five hundred acres."[99] Graham's formal report to the Minister of the Interior, Arthur Meighan, written a few days later advised that a joint inspection of 16,500 acres at the south end of Mistawasis IR 103 had been carried out. Graham described the land as "a first class proposition" and stated that 60 per cent was ready for farming. He emphasised that he considered this land to be one of the best parcels examined so far. Graham also informed Meighan that the Band had surrendered some 5,000 acres of this land a few years before, but that the sale and conditions of the surrender had not been carried out. Graham recommended that the department sell the previously surrendered land for $12 per acre, *en bloc*.[100]

On the same day, Graham wrote to Deputy Superintendent General Scott, reiterating that the Mistawasis Band was willing to surrender more land and outlining proposed terms for the new surrender:

> To surrender 11,520 acres more or less to be disposed of to such person or persons as the Department see fit for the sum of One hundred and thirty eight thousand Dollars ($138,000.00)
>
> That all monies from the disposition thereof shall, after deducting the usual proportion for expenses of management, be disposed of in the following manner
>
> (a) That at the time of signing the surrender there shall be paid to each member of the Band resident upon the Reserve, the sum of One hundred dollars ($100.00)
>
> (b) That of the monies collected from the sale of land after deducting the initial cash payment, fifty per cent. shall be placed to Capital Account for the benefit of the Band in accordance with authority vested in the Honourable the Superintendent General for this purpose

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[97] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, May 10, 1919, NA, RG 10, vol. 7555, file 26107-5, part 1 (ICC Documents, p. 575).

[98] J.D. McLean, Department of Indian Affairs, to W.M. Graham, Commissioner, May 14, 1919 (ICC Documents, p. 578).

[99] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, June 30, 1919, NA, RG 10, vol. 7555, file 26107-5, part 1 (ICC Documents, p. 591).

[100] W.M. Graham, Commissioner, to Arthur Meighan, Minister of the Interior, July 4, 1919, NA, RG 10, vol. 7555, file 26107-5, part 1 (ICC Documents, pp. 593-94).

(c) That the remaining monies collected from the sale of land shall be placed to the credit of an account to be used at the discretion of the Honourable Superintendent General of Indian Affairs, for the following purposes: –

(1) To provide Rations for the old, sick and destitute members of the Band.
(2) Suitable Houses, Furniture and Clothing for old and destitute members of the Band, or houses for young men who start farming.
(3) Farming Outfits of Horses, Harness, Plows or other necessary implements for ablebodied members of the Band who start farming, and for the purchase of Cattle or Threshing Outfits.
(4) To provide compensation to be paid to any Indian who owns buildings or other improvements upon any of the land surrendered.
(5) To make advances free of interest to ablebodied Returned Indian Soldiers who are members of the Mistawasis Band of Indians, for the purpose of providing them with Houses, Stables, Horses, Cattle or Farming Implements.

(d) That on or about the first day of February in each year there shall be distributed equally amongst the members of the Band, an amount equal to the interest accruing from all funds held in trust by the Department.

On July 9, 1919, Scott sent Graham duplicate copies of the 1917 surrender advising that "if the Soldiers Settlement Board purchases this land it will be possible to make a distribution to the Indians of 50% of the capital under the terms of the surrender."[105] On July 21, however, Graham wrote back to Scott warning that a 50 per cent distribution was unwise, as it would cause the department to "[lose] control of this expenditure." He proposed instead to renegotiate the 1917 surrender with the Band on the basis of an upfront payment of $50 per person, with the balance of proceeds to be divided in two. Half the balance was to be deposited to the Band's capital account, and the rest was to be dealt with on the same terms as he had proposed for the new surrender.[106]

On August 8, 1919, Graham presided at a surrender meeting at Mistawasis IR 103 at which two surrenders were executed. The first, which concerned the 5,028 acres previously surrendered in 1917, provided that the Band would receive $60,000 for the land, the proceeds to be handled as Graham had contemplated above.[107] The second surrender, for the 11,520 acres that

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[104] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, July 4, 1919, NA, RG 10, vol. 7555, file 26107-3, part 1 (ICC Documents, pp. 595-97).
[105] D.C. Scott, DSGIA, to W.M. Graham, Commissioner, July 9, 1919, NA, RG 10, vol. 7555, file 26107-3, part 1 (ICC Documents, p. 598).
[106] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, July 21, 1919, NA, RG 10, vol. 7555, file 26107-3, part 1 (ICC Documents, p. 605).
[107] Surrender document signed on August 8, 1919 (5,028 acres), DIAND, Land Registry, Instrument No. X7171 (ICC Documents, pp. 407-12).

the Band had agreed to surrender that year, provided for proceeds of $138,000, which would be distributed as Graham had originally suggested in his letter to Scott of July 4.[105] The documents were forwarded by Graham to Ottawa on August 12, 1919. Attached to each surrender was the standard affidavit, which had been sworn on August 9, 1919, before a justice of the peace. As well, the surrender documents were accompanied by a voters' list and roll of each recorded vote, which had been certified by Inspector W.B. Crombie.

In his formal report, Graham explained the circumstances surrounding the execution of the two surrenders to Deputy Superintendent General Scott. Graham wrote that he had met with the Band at the reserve on August 8 and had read the terms of the 1917 surrender to them. According to Graham,

> they were very indignant over it claiming that they were misled as to the terms of the surrender. They unanimously requested that a new surrender be taken and that the former surrender be cancelled. I accordingly took a new surrender from them in which was embodied the conditions as set out in my previous correspondence with you on the subject. The surrender in duplicate, together with the necessary affidavits and voters' list is enclosed herewith which I trust you will find to be in order.
>
> I also enclose herewith formal surrender taken from the Mistawasis Band of 11,530 [sic] acres, which they agreed to surrender upon my previous visit. The books covering payments made to the Band will go forward under separate cover.

According to the above documents, all 43 eligible voters present at the meeting voted in favour of each surrender.[107]

Both surrenders were approved by an Order in Council dated September 10, 1919:

> The Committee of the Privy Council have had before them a Report, dated 4th September, 1919, from the Superintendent General of Indian Affairs, referring respectively to an Order in Council of 30th June, 1917, (P.C. 1839) accepting a surrender, given on the 21st May, 1917, on the conditions therein mentioned, by the Mistawasis band of Indians, of 5028 acres of their reserve, No. 103, in the Carlton Indian Agency in the province of Saskatchewan; ...
>
> As the conditions on which the above mentioned surrender[s] were given have proved to be unsatisfactory, and, it having been found desirable to permit of the

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[105] Surrender document signed on August 8, 1919, DIAND Land Registry, Instrument No. [illegible] (ICC Documents, pp. 415-18).

[106] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, August 12, 1919, NA, RG 10, vol. 7533, file 26407-3, part 1 (ICC Documents, pp. 424-25).

[107] Certified voting lists (2), dated August 8, 1919, certified by W.B. Crombie, NA, RG 10, vol. 7533, file 26407-3, part 1 (ICC Documents, pp. 419, 421-22).

> surrender[s] being renewed under altered conditions, the Minister recommends that the above mentioned Order[s] in Council of 30th June, 1917, be cancelled.
>
> The Minister states that the land comprised within the above mentioned surrender[s] has been applied for by the Soldier Settlement Board of Canada, and that the Mistawasis band[s] have renewed the surrender[s] of the 5028 acres in reserve No. 103, by surrender dated 8th August, 1919, on the altered conditions set out in the said surrender[s].
>
> That an additional area of 11520 acres having been applied for by the Soldier Settlement Board, in Indian reserve No. 103, a surrender thereof has been given, dated 8th August, 1919, by the Mistawasis band, on the conditions therein mentioned.
>
> The Minister further states that the surrenders last above mentioned, which are submitted herewith in duplicate, have been duly authorized, executed and attested in the manner required by the 49th Section of the Indian Act.[108]

Two weeks later, the land was transferred by Order in Council to the Soldier Settlement Board, for the price contemplated in the surrenders.[109]

Although the 1917 surrender had specifically included road allowances, neither the replacement surrender nor the new surrender of 11,520 acres referred to road allowances in any way. This omission became an issue in 1920, when a question arose as to who owned the road allowance between Townships 47 and 48, which was the dividing line between the land originally surrendered in 1917 and the 11,520 acres surrendered in 1919. When Agent John Weir advised departmental officials that the Indians of the Mistawasis Band had taken the position that they owned the road allowance referred to above, J.D. McLean replied that it was "understood" that the road allowances had also been surrendered.[110] In a letter written the same day to Commissioner Graham, McLean directed that, if there were "any further trouble regarding this matter," Graham was to explain it to the Indians.[111]

The following year, Surveyor H.W. Fairchild reported that he had been approached by the Chief and councillors of the Mistawasis Band with a complaint that the surveyors subdividing the surrendered portion of the reserve had located the road allowance north of the north boundary of Township 47, thereby encroaching into the reserve. After examining the surrender, Fairchild concluded that no road allowance had been surrendered, and he

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108 Order in Council PC 1893, September 10, 1919 (ICC Documents, pp. 487-89).
109 Order in Council PC 1982, September 24, 1919 (ICC Documents, pp. 441-44).
110 J.D. McLean, Assistant Deputy and Secretary, to John Weir, Indian Agent, June 9, 1920, NA, RG 10, vol. 6655, file 107A-5-1 (ICC Documents, p. 469).
111 J.D. McLean, Assistant Deputy and Secretary, to W. Graham, Commissioner, June 9, 1920, NA, RG 10, vol. 6655, file 107A-5-1 (ICC Documents, p. 470).

recommended that the Band be compensated for the land in question.[112] An internal memorandum prepared by an official of the department confirmed Fairchild's conclusion concerning the legal effect of the surrender. The official wrote, however, that, since the Soldier Settlement Board had paid for a portion of the surrendered land which was covered by water, the resulting overpayment more than compensated the Band for the road allowances.[113] Later that month, J.D. McLean informed Chief Dreaver of the above and advised that the land comprising the road allowance was to be expropriated under the *Indian Act*, and transferred to the province of Saskatchewan.[114] The transfer, by Order in Council, took place on February 20, 1922.[115]

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[112] H.W. Fairchild, Surveyor, to J.D. McLean, Assistant Deputy and Secretary, November 17, 1921, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 484).

[113] D.F. Robertson to J.D. McLean, Assistant Deputy and Secretary, November 21, 1921, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, pp. 485-87).

[114] J.D. McLean, Assistant Deputy and Secretary, to Chief George Dreaver, Mistawasis Band, November 24, 1921, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 490).

[115] Order in Council PC 581, February 20, 1922 (ICC Documents, pp. 494-98).

PART III

ISSUES

The broad question before the Commission was whether Canada owes an outstanding lawful obligation to the Mistawasis First Nation as a result of events arising out of the 1911, 1917, and 1919 surrenders. After extensive discussion between the parties, the following list of issues was agreed upon.

1911 SURRENDER

1 Were the surrender provisions of the *Indian Act*, RSC 1906, c. 81 complied with when the surrender of part of reserve no. 103 was obtained in 1911? If not, did any such non-compliance render the surrender invalid?

2 Did Canada owe any pre-surrender fiduciary obligations to the Band, and if so, did Canada fulfil such obligations in the context of the 1911 surrender? In particular:

(a) Was the 1911 surrender exploitative in nature?
(b) Was the 1911 surrender obtained as a result of tainted dealings?
(c) Are there any other grounds upon which Canada breached any pre-surrender fiduciary obligations?

To the extent Canada breached any pre-surrender fiduciary obligations in the context of this surrender, do any such breaches render the surrender invalid?

3 Did Canada breach any obligations in failing to purchase specific farm machinery for the Band from the proceeds of sale, as required by the terms of the surrender? In particular:

(a) Did Canada's failure to purchase such equipment from the Band's sale funds amount to a breach of duty in light of Canada's subsequent decision to purchase, on its own, such equipment for the use of all the bands within the Agency, including the Mistawasis First Nation? and

(b) To the extent a breach of duty exists, do any damages flow from such a breach?

4 If a valid surrender was taken, did it include the mines and minerals associated with this land, and if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation when it failed to reserve the mines and minerals for the benefit of the First Nation?

5 Was the First Nation properly compensated in relation to road allowances within the surrendered lands and, if not, did this constitute a breach of Canada's fiduciary obligation to the First Nation?

1917 SURRENDER

6 Were the surrender provisions of the *Indian Act*, RSC 1906, c. 81 complied with when the surrender of part of reserve no. 103 was obtained in 1917? If not, did any such non-compliance render the surrender invalid?

7 Did Canada owe any pre-surrender fiduciary obligations to the Band, and if so, did Canada fulfil such obligations in the context of the 1917 surrender? In particular:

(a) Was the 1917 surrender exploitative in nature?
(b) Was the 1917 surrender obtained as a result of tainted dealings?
(c) Are there any other grounds upon which Canada breached any pre-surrender fiduciary obligations?

To the extent Canada breached any pre-surrender fiduciary obligations in the context of this surrender, do any such breaches render the surrender invalid?

8 If a valid surrender was taken, did it include the mines and minerals associated with this land, and if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation when it failed to reserve the mines and minerals for the benefit of the First Nation?

9 Did Canada properly revoke the 1917 surrender?

1919 SURRENDERS

10 Were the surrender provisions of the *Indian Act*, R.S.C. 1906, c. 81 complied with when the surrenders of part of reserve no. 103 were obtained in 1919? If not, did any such non-compliance render the surrenders invalid?

11 Did Canada owe any pre-surrender fiduciary obligations to the Band, and if so, did Canada fulfil such obligations in the context of the 1919 surrenders? In particular

(a) Were the 1919 surrenders exploitative in nature?
(b) Were the 1919 surrenders obtained as a result of tainted dealings?
(c) Are there any other grounds upon which Canada breached any pre-surrender fiduciary obligations?

To the extent Canada breached any pre-surrender fiduciary obligations in the context of these surrenders, do any such breaches render the surrenders invalid?

12 If valid surrenders were taken, did they include the mines and minerals associated with these lands, and if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation when it failed to reserve the mines and minerals for the benefit of the First Nation?

13 If valid surrenders were taken, did the Crown breach any fiduciary or trust obligations owed to the First Nation by not ensuring the First Nation was properly compensated for improvements to the land?

14 (a) Did any road allowances form part of the Indian reserve?
(b) If valid surrenders were taken, did they include any road allowances within the land surrendered and, if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation in its subsequent handling of these road allowances?
(c) Was the First Nation properly compensated for any portion of the road allowance which, subsequent to the surrenders, remained within the Indian reserve and which was subsequently expropriated in 1922?

15 If valid surrenders were taken, has the Crown breached any lawful obligations owed to the First Nation in relation to approximately 256.6 acres of wet lands located on this land?

GENERAL

16 If the evidence is inconclusive in determining any of the above issues, upon whom does the onus of proof rest?

PART IV

CONCLUSION

On November 8, 1994, Assistant Deputy Minister John Sinclair, of the Department of Indian Affairs and Northern Development, informed Chief Leona Daniels of the Mistawasis First Nation that Canada was prepared to accept for negotiation portions of the First Nation's surrenders claim. Although the First Nation applied to the Commission for a review of the rejected portions of the claim in 1996, the claim was subsequently put into abeyance when the parties resumed negotiations. In the spring of 2001, the Commission was informed that the parties had concluded a Settlement Agreement with respect to this claim.

In light of the above, the Commission suspended its inquiry and congratulates the parties on their Settlement Agreement.

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine

Phil Fontaine
Chief Commissioner

Roger Augustine
Commissioner

Dated this 27th day of March, 2002.

APPENDIX A

MISTAWASIS FIRST NATION INQUIRY – 1911, 1917, AND 1919 SURRENDERS

1 Planning conference January 5, 1999

2 Community session June 15, 1999

One community session was held at the Mistawasis First Nation school gymnasium. The Commission heard evidence from elders Leonard Johnstone, Annie Ledoux, Albert Badger, Arthur Ledoux, Walter Johnstone, Antoine Sand, and Gladys Johnstone.

3 Content of formal record

The formal record for this inquiry consists of the following materials:

- the documentary record (4 volumes of documents plus one annotated index)
- 9 exhibits tendered during the inquiry

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

RESPONSES

Re: Carry the Kettle First Nation Cypress Hills Inquiry
Robert D. Nault, Minister of Indian Affairs and Northern Development, to
Roger J. Augustine, Carole T. Corcoran, James Prentice,
Indian Claims Commission,
January 5, 2001
373

Re: Cowessess First Nation 1907 Surrender Claim Inquiry
Robert D. Nault, Minister of Indian Affairs and Northern Development, to
Phil Fontaine, Indian Claims Commission,
March 27, 2002
376

Re: Primrose Lake Air Weapons Range (PLAWR) II Inquiries
Robert D. Nault, Minister of Indian Affairs and Northern Development, to
Phil Fontaine, Indian Claims Commission,
Richard Mirasty, Flying Dust First Nation,
Joseph Fiddler, Waterhen Lake First Nation,
Elmer Campbell, Buffalo River Dene Nation,
Ernest Sundown, Big Island Lake (Joseph Bighead) Cree Nation,
March 27, 2002
378

Mr Robert Augustine
Ms Carole T. Corcoran
Mr James Prentice, Q.C.
Co-Chairs
Indian Specific Claims Commission
PO Box 1750, Station B
Ottawa ON K1P 1A2

Dear Commissioners Augustine, Corcoran and Prentice:

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Canada

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Although there are several references in the report with which Canada does not concur, Canada agrees with the ISCC that the lands in the survey plan were not set apart as a reserve pursuant to the terms of Treaty 4, the provisions of the *Indian Act* or on a de facto basis.

The ISCC recommended that the Government of Canada undertake the following: acquire the site of the Cypress Hills massacre and recognize it for its historical significance, and work with the Assiniboine people to secure an appropriate site in the Cypress Hills for the cultural and spiritual purposes of this First Nation. My colleague, the Honourable Sheila Copps, Minister of Canadian Heritage, has the mandate to designate national historic sites. If the Carry the Kettle First Nation is interested in pursuing this process, Parks Canada will assist it in this endeavour.

For its part, Indian and Northern Affairs Canada's (INAC) Saskatchewan Regional Office is helping the Carry the Kettle First Nation re-establish its association with the Cypress Hills. It is providing financial assistance to Carry the Kettle First Nation in the development of a cultural interpretive program at the Cypress Hills Interprovincial Park in partnership with the Nekaneet First Nation, and the Saskatchewan Ministry of Environment and Resource Management.

The interpretative program will serve to educate park visitors about the views and beliefs of First Nation peoples and their history and relationship to the natural environment. Cultural history and traditions would be presented to promote an understanding of local history and its effects on contemporary life in the area of Cypress Hills Interprovincial Park.

Ms. Elsie Koochicum and Ms. Joyce [illegible] of Carry the Kettle First Nation have been active participants in this project. They have recommended that both Nekaneet and Carry the Kettle First Nations' histories be documented and that information be disseminated as part of the park's interpretative programming. As well, INAC's Saskatchewan Regional Office has reached an agreement with both First Nations to proceed with researching and developing a First Nations interpretative program this fiscal year with a view to full implementation by next summer.

Furthermore, with its Treaty Land Entitlement settlement, the Carry the Kettle First Nation purchased 2,500 acres of Crown land near the Cypress Hills. The First Nation negotiated a conservation easement agreement on the land previously protected by the Saskatchewan *Wildlife Habitat Protection Act*. In December 1999, the provincial government and the Carry the Kettle First Nation initiated a resource management

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participation agreement that laid the groundwork for the easement. Around the same time, the Carry the Kettle First Nation bought two deeded quarter sections in the Cypress Hills. In total, the Carry the Kettle First Nation purchased 2,880 acres in the rural municipality of Maple Creek near Cypress Hills. The lands are currently being used for agricultural purposes (grain production and grazing) through a lease to a non-band member.

I would like to thank the Indian Specific Claims Commission for its consideration of this claim.

Yours sincerely,

Robert D. Nault, P.C., M.P.

c.c.: The Honourable Sheila Copps, P.C., M.P.

MAR 27 2002

Mr. Phil Fontaine
Chief Commissioner
Indian Specific Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Mr. Fontaine:

I wish to thank Commissioner Roger Augustine for his letter of April [illegible], 2001, to my colleague, the Honourable Anne McLellan, former Minister of Justice and Attorney General of Canada, former Chief Terrance Pelletier, Cowessess First Nation, and [illegible] enclosing a copy of the March 2001 Indian Specific Claims Commission (ISCC) interim report on its inquiry into the Cowessess First Nation's specific claim regarding the 1907 surrender of a portion of Indian Reserve 73.

This report deals with one part of the Cowessess First Nation's claim, rejected [illegible] by Canada, alleging that a breach of section 49 of the Indian Act [illegible] occurred when Canada took the 1907 surrender of [illegible]. By agreement of the parties, the three issues considered in the first phase of the inquiry were:

1. The application of section 49 of the Indian Act.
2. The number of eligible voters present at the surrender meeting [illegible].
3. Whether or not a majority of the eligible voters assented.

The other allegations of the First Nation regarding pre- and post-surrender breaches were not dealt with in Phase I of the inquiry.

I appreciate the work which the ISCC undertook relative to this inquiry. On the basis of your conclusions, you have recommended that Canada accept the First Nation's Claim for negotiation. Canada has reviewed your recommendations and the basis thereto in detail. A summary of the ISCC conclusions and Canada's position follows.

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1. The ISCC accepts Cowessess's argument that there were 30 band members present at the vote.

   Canada asserts that there is no persuasive evidence of the presence of a 30th voter. Twenty-nine names are recorded as being present at the vote on the voters list. The 30th name may have been added to the surrender document later. We note that the ISCC itself indicates that whether there were 29 or 30 members at the vote is equivocal but decided the matter on inferences drawn from the signing of the surrender document. Payment of the surrender monies took place over the period of a week, thus the 30th signature could have been added at any time during that time period. With respect, Canada is not convinced that it is more likely than not that a 30th voter was present at the vote.

2. The ISCC agrees with the First Nation's interpretation of the word "majority" to mean a majority of those present.

   While Canada [illegible] agree that our position is not [illegible] interpretation, in [illegible] the [illegible] Supreme Court [illegible] interpreting the word "majority" [illegible] to mean a majority of voters [illegible]. Canada [illegible] the position of the Supreme Court [illegible]. Thus Canada does not agree with the First Nation's interpretation and asserts that, given the [illegible], 29 [illegible] constitutes a majority of a total of [illegible] voters list.

In summary, it is our view that Canada does not owe an outstanding lawful obligation to the Cowessess First Nation regarding the 1907 Surrender with respect to the Phase I issues. However, as previously agreed between the parties, the inquiry should continue with Phase II, which [illegible] together the issues [illegible] the [illegible] of the surrender itself.

My officials are prepared to meet with you and the representatives of the First Nation at a mutually agreed upon time to pursue Phase II of the inquiry.

Again, thank you for the work you have done in this phase of the inquiry. Should you require any further details, please feel free to contact Canada's lead counsel in this inquiry, Mr. Jeffrey [illegible], at [illegible].

Yours sincerely,

Robert D. Nault, P.C., M.P.

c.c.: The Honourable Martin Cauchon, P.C., M.P.
Chief Patricia Sparvier

MAR 27 2002

Mr. Phil Fontaine
Chief Commissioner
Indian Specific Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Mr. Fontaine:

This is in response to the Indian Specific Claims Commission's (ISCC) September 1998 report, entitled *Primrose Lake Air Weapons Range II Inquiry Report*, copies of which were presented to my predecessor, the Honourable Jane Stewart. I regret Canada's delay in responding to the Commission's report on this claim.

As you know, three issues were canvassed by the Commission in this report:

- Whether Canada has an outstanding lawful obligation towards the claimants arising from the creation of the range;

- Did Canada breach its treaty obligations; and

- Did Canada have fiduciary duty towards the claimants, and did it breach that duty?

In addition, Canada's "statement of issues" included an additional issue:

- Were there oral agreements made collateral to Treaty No. 6 and Treaty No. 10 and, if so, what are their effects?

As you will note, the ISCC report concludes that the Government of Canada did not breach its treaty obligations to the Buffalo River Dene, Flying Dust, Waterhen Lake and Big Island Lake Cree First Nations. The report also concludes that there is no entitlement to compensation for the reduction in food harvesting rights based on breach

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Canada

of a fiduciary duty. However, the report concludes that the Government of Canada breached its fiduciary obligation to the Buffalo River Dene Nation, the Waterhen Lake First Nation and the Flying Dust First Nation by failing to ensure that First Nations people were compensated for lost commercial harvesting rights. The ISCC recommended that Canada accept these claims for negotiation on this basis. Finally, the Commission recommended that the claim of the Big Island Lake Cree Nation was properly rejected under the policy.

After a thorough consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to accept the claim of the Buffalo River Dene, Waterhen Lake and Flying Dust First Nations for negotiation under the Specific Claims Policy. This is due to the fact that the policy addresses only claims by a First Nation collective, and not individual rights. The ISCC's recommendation that Canada accept the First Nations' claims and negotiate to compensate for the loss of commercial harvesting rights is based on a memorandum of understanding between Canada and Saskatchewan dated August 4, 1953, in which Canada agreed to compensate "persons or corporations" having rights in the area. However, the commercial harvesting rights to which the ISCC report refers were held by individuals or groups of people rather than by any of the claimant First Nations.

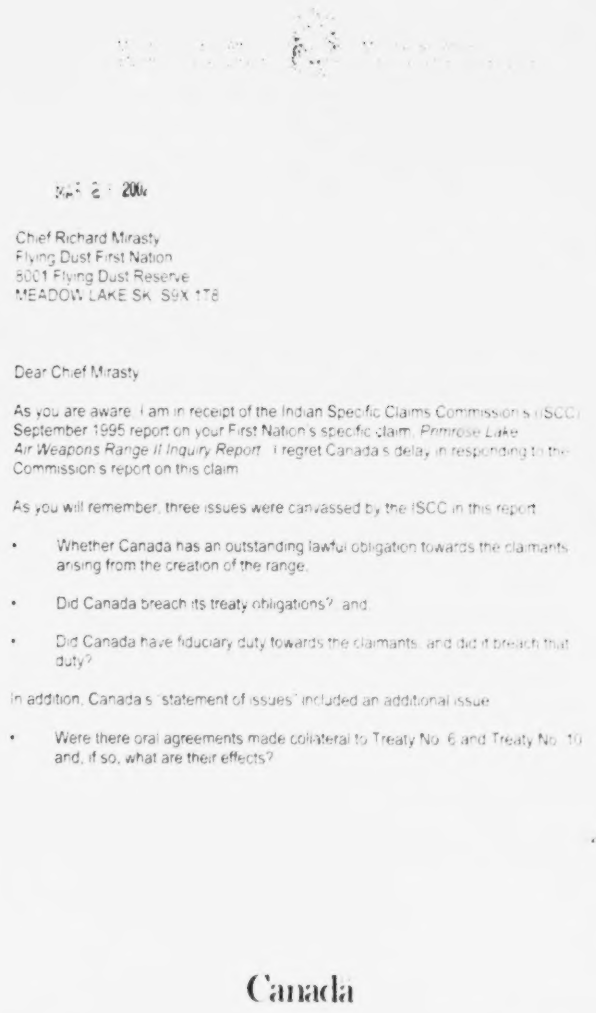
Further, under the terms of this agreement between Canada and Saskatchewan, compensation for commercial harvesting rights was not based on either Indian status or membership in an Indian Band; rather, it was to be paid to anyone who held a licence on the land which became the Primrose Lake Air Weapons Range.

I would like to thank the Indian Specific Claims Commission for its considerable time and work throughout this inquiry. I thank you also for your patience in waiting for Canada's response, and I regret that my reply could not be more positive.

Yours sincerely,

Robert D Nault

Robert D. Nault, P.C., M.P.



MAR 2 [illegible] 2006

Chief Richard Mirasty
Flying Dust First Nation
8001 Flying Dust Reserve
MEADOW LAKE SK S9X 1T8

Dear Chief Mirasty

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) September 1995 report on your First Nation's specific claim, *Primrose Lake Air Weapons Range II Inquiry Report*. I regret Canada's delay in responding to the Commission's report on this claim.

As you will remember, three issues were canvassed by the ISCC in this report

- Whether Canada has an outstanding lawful obligation towards the claimants arising from the creation of the range.
- Did Canada breach its treaty obligations?, and
- Did Canada have fiduciary duty towards the claimants, and did it breach that duty?

In addition, Canada's "statement of issues" included an additional issue

- Were there oral agreements made collateral to Treaty No. 6 and Treaty No. 10 and, if so, what are their effects?

Canada

- 2 -

As you know, the ISCC report concludes that the Government of Canada did not breach its treaty obligations to the Flying Dust, Buffalo River Dene, Waterhen Lake and Big Island Lake Cree First Nations. The report also concludes that there is no entitlement to compensation for the reduction in food harvesting rights based on breach of a fiduciary duty. However, the report concludes that the Government of Canada breached its fiduciary obligation to the Flying Dust First Nation, as well as to the Waterhen Lake First Nation and the Buffalo River Dene Nation, by failing to ensure that First Nations people were compensated for lost commercial harvesting rights. The ISCC recommended that Canada accept these claims for negotiation.

After a thorough consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to enter into negotiations with the Flying Dust First Nation under the Specific Claims Policy. I regret that this claim cannot be negotiated under the policy, as the policy addresses only claims by a First Nation collective, and not individual rights. The ISCC report concludes that Canada should accept the First Nations' claims and negotiate to compensate for the loss of commercial harvesting rights. It bases its finding on a memorandum of understanding between Canada and Saskatchewan dated August 4, 1953, in which Canada agreed to compensate "persons or corporations" having rights in the area. However, the commercial harvesting rights which the ISCC report refers to were held by individuals or groups of people rather than by the Buffalo River Dene Nation or other claimant First Nations.

Further, under the terms of this agreement between Canada and Saskatchewan, compensation for commercial harvesting rights was not based on either Indian status or membership in an Indian Band; rather, it was to be paid to anyone who held a licence on the land which became the Primrose Lake Air Weapons Range.

I thank you for your patience in waiting for Canada's response, and I regret that my reply could not be more positive.

Yours sincerely,

Robert D. Nault, P.C., M.P.

c.c.: Mr. Phil Fontaine

[illegible]

[illegible]

Chief Joseph Fiddler
Waterhen Lake First Nation
PO Box 9
WATERHEN LAKE SK S0M 3B0

Dear Chief Fiddler:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) September 1995 report on your First Nation's specific claim, *Primrose Lake Air Weapons Range II Inquiry Report*. I regret Canada's delay in responding to the Commission's report on this claim.

As you will remember, three issues were canvassed by the ISCC in this report:

- Whether Canada has an outstanding lawful obligation towards the claimants arising from the creation of the range.
- Did Canada breach its treaty obligations?, and
- Did Canada have fiduciary duty towards the claimants, and did it breach that duty?

In addition, Canada's "statement of issues" included an additional issue:

- Were there oral agreements made collateral to Treaty No. 6 and Treaty No. 10 and, if so, what are their effects?

/2

Canada

As you know, the ISCC report concludes that the Government of Canada did not breach its treaty obligations to the Waterhen Lake, Buffalo River Dene, Flying Dust and Big Island Lake Cree First Nations. The report also concludes that there is no entitlement to compensation for the reduction in food harvesting rights based on breach of a fiduciary duty. However, the report concludes that the Government of Canada breached its fiduciary obligation to the Waterhen Lake First Nation, as well as to the Buffalo River Dene Nation and the Flying Dust First Nation, by failing to ensure that First Nations people were compensated for lost commercial harvesting rights. The ISCC recommended that Canada accept these claims for negotiation.

After a thorough consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to enter into negotiations with the Waterhen Lake First Nation under the Specific Claims Policy. I regret that this claim cannot be negotiated under the policy, as the policy addresses only claims by a First Nation collective, and not individual rights. The ISCC report concludes that Canada should accept the First Nations' claims and negotiate to compensate for the loss of commercial harvesting rights. It bases its finding on a memorandum of understanding between Canada and Saskatchewan dated August 4, 1953, in which Canada agreed to compensate "persons or corporations" having rights in the area. However, the commercial harvesting rights which the ISCC report refers to were held by individuals or groups of people rather than by the Buffalo River Dene Nation or other claimant First Nations.

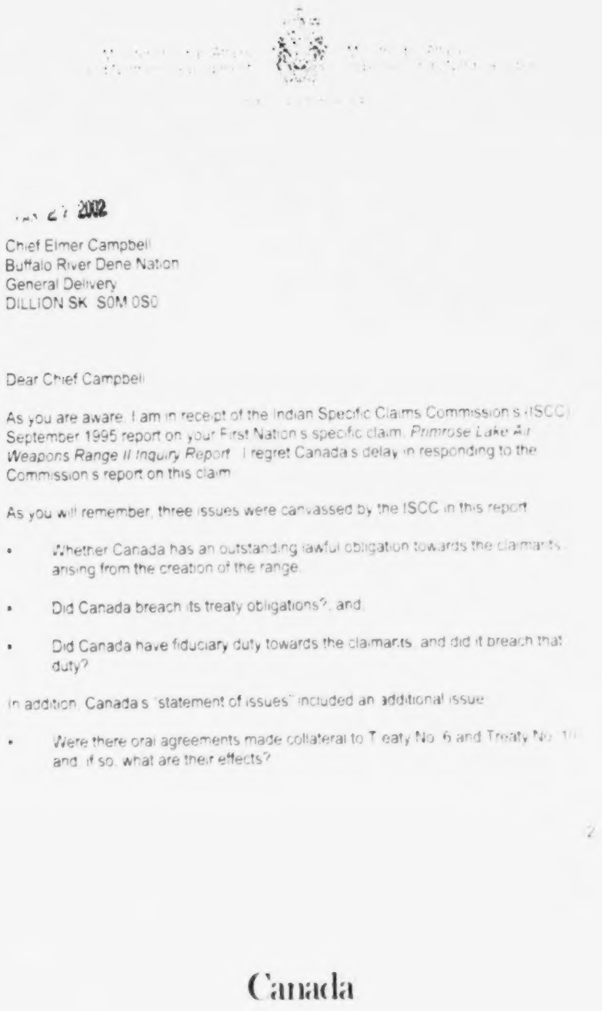
Further, under the terms of this agreement between Canada and Saskatchewan, compensation for commercial harvesting rights was not based on either Indian status or membership in an Indian Band; rather, it was to be paid to anyone who held a licence on the land which became the Primrose Lake Air Weapons Range.

I thank you for your patience in waiting for Canada's response, and I regret that my reply could not be more positive.

Yours sincerely,

Robert D. Nault, P.C., M.P.

c.c. Mr. Phil Fontaine



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Chief Elmer Campbell
Buffalo River Dene Nation
General Delivery
DILLION SK S0M 0S0

Dear Chief Campbell:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) September 1995 report on your First Nation's specific claim, *Primrose Lake Air Weapons Range II Inquiry Report*. I regret Canada's delay in responding to the Commission's report on this claim.

As you will remember, three issues were canvassed by the ISCC in this report:

- Whether Canada has an outstanding lawful obligation towards the claimants arising from the creation of the range;
- Did Canada breach its treaty obligations?; and,
- Did Canada have fiduciary duty towards the claimants, and did it breach that duty?

In addition, Canada's "statement of issues" included an additional issue:

- Were there oral agreements made collateral to Treaty No. 6 and Treaty No. 10, and, if so, what are their effects?

2

Canada

As you know, the ISCC report concludes that the Government of Canada did not breach its treaty obligations to the Buffalo River Dene, Flying Dust, Waterhen Lake and Big Island Lake Cree First Nations. The report also concludes that there is no entitlement to compensation for the reduction in food harvesting rights based on breach of a fiduciary duty. However, the report concludes that the Government of Canada breached its fiduciary obligation to the Buffalo River Dene Nation, as well as the Waterhen Lake and Flying Dust First Nations, by failing to ensure that First Nations people were compensated for lost commercial harvesting rights. The ISCC recommended that Canada accept these claims for negotiation.

After a thorough consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to enter into negotiations with the Buffalo River Dene under the Specific Claims Policy. I regret that this claim cannot be negotiated under the policy, as the policy addresses only claims by a First Nation collective, and not individual rights. The ISCC report concludes that Canada should accept the First Nations' claims and negotiate to compensate for the loss of commercial harvesting rights. It bases its finding on a memorandum of understanding between Canada and Saskatchewan dated August 4, 1953, in which Canada agreed to compensate "persons or corporations" having rights in the area. However, the commercial harvesting rights which the ISCC report refers to were held by individuals or groups of people rather than by the Buffalo River Dene Nation or other claimant First Nations.

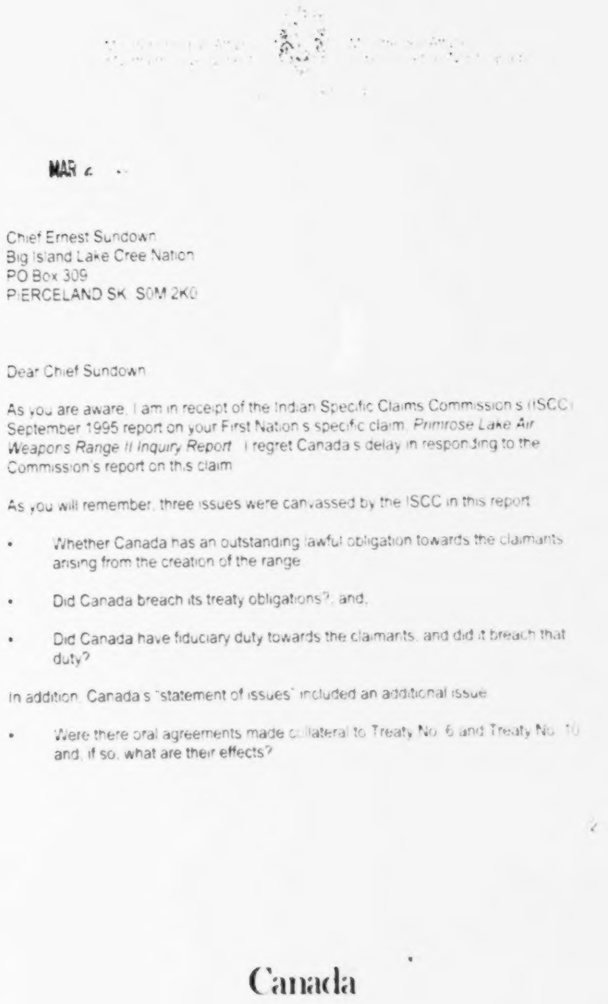
Further, under the terms of this agreement between Canada and Saskatchewan, compensation for commercial harvesting rights was not based on either Indian status or membership in an Indian Band; rather, it was to be paid to anyone who held a licence on the land which became the Primrose Lake Air Weapons Range.

I thank you for your patience in waiting for Canada's response, and I regret that my reply could not be more positive.

Yours sincerely,

Robert D. Nault, P.C., M.P.

c.c. Mr. Phil Fontaine



MAR 6

Chief Ernest Sundown
Big Island Lake Cree Nation
PO Box 309
PIERCELAND SK S0M 2K0

Dear Chief Sundown:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) September 1995 report on your First Nation's specific claim, *Primrose Lake Air Weapons Range II Inquiry Report*. I regret Canada's delay in responding to the Commission's report on this claim.

As you will remember, three issues were canvassed by the ISCC in this report:

- Whether Canada has an outstanding lawful obligation towards the claimants arising from the creation of the range;
- Did Canada breach its treaty obligations?; and,
- Did Canada have fiduciary duty towards the claimants, and did it breach that duty?

In addition, Canada's "statement of issues" included an additional issue:

- Were there oral agreements made collateral to Treaty No. 6 and Treaty No. 10 and, if so, what are their effects?

.../2

Canada

As you know, the ISCC report concludes that the Government of Canada did not breach its treaty obligations to the Big Island Lake Cree Nation (BILCN), Buffalo River Dene, Flying Dust and Waterhen Lake First Nations. The report also concludes that there is no entitlement to compensation for the reduction in food harvesting rights based on breach of a fiduciary duty. Finally, the ISCC concluded that the BILCN claim was properly rejected by the then Minister, the Honourable Judd Buchanan, on the basis that it lost none of its traditional harvesting lands when the Range was created.

I would like to advise you that the Government of Canada accepts the ISCC's conclusions with respect to the BILCN.

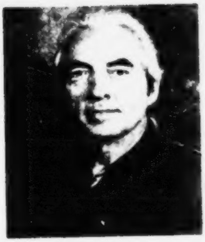
I thank you for your patience in waiting for Canada's response.

Yours sincerely,

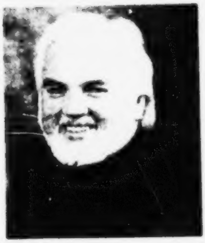
Robert D. Nault, P.C., M.P.

c.c.   Mr. Phil Fontaine

THE COMMISSIONERS



Chief Commissioner Phil Fontaine is an Ojibway from the Sagkeeng First Nation in Manitoba. He has worked for many years on behalf of First Nations and has also served as an elected leader in a number of senior positions in both the federal and First Nations governments. He served as National Chief of the Assembly of First Nations (AFN) for three years until July 2000 and previously was Grand Chief of the Assembly of Manitoba Chiefs. Before serving as Grand Chief, Mr Fontaine represented Manitoba at the AFN as Vice-Chief. His experience with the federal public service includes the positions of director general of the Yukon Region of the Department of Indian Affairs and Northern Development and deputy coordinator of the Native Economic Development Program. Mr Fontaine received a National Aboriginal Achievement Award in 1996 in recognition of his public service. He holds a bachelor of arts degree with a major in political studies from the University of Manitoba. Mr Fontaine was appointed Chief Commissioner of the Indian Claims Commission on August 29, 2001.



Roger J. Augustine is a Mi'kmaq born in Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was elected president of the Union of NB–PEI First Nations in 1988, and completed his term in January 1994. He received the prestigious Medal of Distinction from the Canadian Centre on Substance Abuse for 1993 and 1994 in recognition of his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Centre. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. Mr Augustine was appointed Commissioner of the Indian Claims Commission on July 27, 1992.

Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first Vice-Chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is currently president of Dan Bellegarde & Associates, a consulting firm specializing in strategic planning, management and leadership development, self-governance, and human resource development in general. Mr Bellegarde was appointed Commissioner, then Co-Chair of the Indian Claims Commission, on July 27, 1992 and April 19, 1994, respectively. He held the position of Co-Chair until the appointment of Phil Fontaine as Chief Commissioner.

Renée Dupuis has had a private law practice in Quebec City since 1973. From the outset, she focused largely on human rights and specifically on the rights of Canada's aboriginal peoples. From 1972 to 1975, she served as lawyer for the Association of Indians of Quebec and beginning in 1978, acted as legal advisor to the three Attikamek and nine Montagnais bands in her home province, representing the bands in their land claims negotiations with the federal, Quebec, and Newfoundland governments, as well as in the constitutional negotiations. From 1989 to 1995, Mme Dupuis served two terms as Commissioner of the Canadian Human Rights Commission. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles, and lectured extensively on human rights, administrative law, and aboriginal rights. Mme Dupuis is a graduate in law from the Université Laval and holds a master's degree in public administration from the École nationale d'administration publique. She was appointed Commissioner of the Indian Claims Commission on March 28, 2001.

Alan C. Holman is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, PEI; editor-publisher of a weekly newspaper in rural PEI; a radio reporter with CBC in Inuvik, NWT; and a reporter for the Charlottetown *Guardian*, *Windsor Star*, and *Ottawa Citizen*. From 1980 to 1986, he was Atlantic parliamentary correspondent for CBC-TV news in Ottawa. In 1987, he was appointed parliamentary bureau chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become principal secretary to then-PEI Premier Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the PEI Department of Development. Since the fall of 2000, Mr Holman has worked as a freelance writer and broadcaster. He was educated at King's College School in Windsor, NS, and Prince of Wales College in Charlottetown, where he makes his home. He was appointed Commissioner of the Indian Claims Commission on March 28, 2001.

Sheila G. Purdy has been an advisor to the government of the Northwest Territories on justice and other matters relating to territorial division and the creation of Nunavut. From 1993 to 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on a number of justice issues, including aboriginal justice, the *Canadian Human Rights Act*, and violence against women. From 1991 to 1993, she acted as policy analyst on the constitution, justice, aboriginal affairs, women, human rights, and also for the Solicitor General. In 1992 and 1993, she was a special advisor on aboriginal affairs to the Office of the Leader of the Opposition and from 1989 to 1991, she was legal consultant on environmental issues. She has been active in advocating against abuse of the elderly, and in 1988, she received the Award of Merit from Concerned Friends for her work in this area. She worked as a lawyer in private practice from 1982 to 1985 after graduating with a law degree from the University of Ottawa in 1980. She was appointed Commissioner of the Indian Claims Commission on May 4, 1999.